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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

RUTH RUSHEN, Director, California Department of Corrections; JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California,
Petitioners,

vs.

JOHNNY SPAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the *ex parte* communication between a juror and the trial court about a matter unrelated to any fact in issue in respondent's state trial requires reversal without a showing of prejudice?

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No. _____

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RUTH RUSHEN, Director, California Department of Corrections; JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California,

Petitioners,

v.

JOHNNY SPAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 24, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. A copy of the opinion is attached to this petition as Appendix A. The opinion of the District Court for the Northern District of California is reported at 543 F.Supp. 757. A copy of the opinion is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 24, 1983. Rehearing was denied on March 17, 1983. This petition for writ of certiorari was filed within 90 days of the latter date. 28 U.S.C. section 2102(c); Supreme Court Rule 20.2, 20.4. This Court's jurisdiction is invoked under 28 U.S.C section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Amendment XIV, section 1, provides in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. State Proceedings:

On October 1, 1971, the Marin County Grand Jury filed an indictment charging petitioner-appellee Johnny Spain with five counts of murder, in violation of California Penal Code section 187; one count of conspiracy (§ 182) to escape (§ 4530(a)), to possess a firearm (§ 4574), and to kidnap (§ 207); and one count of assault with a deadly weapon by a life prisoner upon a non-inmate (§ 4500) (SCT 1-8).[1/] Six other persons (Stephen M. Bingham, David Johnson, Hugo A. Pinell, Fleeta Drumgo, Luis N. Talamantez, and Willie Tate) were charged with these and other offenses in the indictment.

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1. "SCT" designates the Clerk's Trancript of the proceedings in state court.

During the next three and one-half years, the six defendants[2/] filed nearly 200 written motions. Trial finally began on March 25, 1975 (SCT 2721). On August 12, 1976, the 226th day of trial, after 24 days of deliberation, the jury found respondent guilty of two counts of murder, and of conspiracy to escape. He was found not guilty on all other counts (SCT 5300-5306).

On October 1, 1976, respondent's motion for a new trial was denied and he was sentenced to state prison for life (SCT 5505-5506; 5507-5508).

On July 24, 1980, the California Court of Appeal, First Appellate District, affirmed the judgments of conviction of respondent and two other convicted defendants (Pinell and Johnson) in People v. Spain, Pinell, and Johnson,

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2. Bingham was never apprehended.

No. 1/Crim. 16126, in the files of that court (CR 1).[3] The California Supreme Court denied a hearing on October 15, 1980 (CR 1; Exh. B).

B. Federal Proceedings:

Respondent filed for petition for writ of habeas corpus in federal district court on June 29, 1981 in Spain v. Rushen, C-81-2735 TEH. After ordering the filing of a response, and holding oral argument, the district court dismissed the petition on November 24, 1981, for failure to exhaust state remedies as to the second (shackling) issue (CR 11:10).

On December 31, 1981, after exhausting state remedies, respondent filed a

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3. "CR" refers to the District Court Clerk's Record, followed by the docket number and page number. "CR 1" designates respondent's petition for writ of habeas corpus in federal district court. A copy of the above-referenced opinion is attached to this petition as Appendix C.

second petition for writ of habeas corpus (CR 1). On January 6, 1982, an order to show cause was issued (CT 3). Petitioners filed a return to the order to show cause on February 1, 1982 (CT 5). On June 29, 1982, the district court granted the petition for writ of habeas corpus, ordering the State of California to retry respondent within 90 days or release him from custody with respect to the convictions at issue (CT 11-12).

Petitioners filed a notice of appeal on July 2, 1982 (CR 13).

On January 24, 1983, the Court of Appeals for the Ninth Circuit affirmed the order of the district court in a brief memorandum opinion. On March 17, 1983, the Court of Appeals denied a petition for rehearing and rejected the suggestion for rehearing en banc. Appendix D.

STATEMENT OF FACTS

The opinion of the California Court of Appeal adequately summarizes the facts of the offenses. We set forth the court of appeal's summary:

> "Johnny Larry Spain was found guilty of the first degree murders (Pen. Code, § 187) of two of the three correctional officers who were killed, and conspiracy to escape by force or violence (Pen. Code, §§ 182, 4530, subd. (a)). There was no substantial evidence that Spain personally committed the murders; instead, the evidence pointed to George Jackson as the killer. Spain's guilt of the murders was the probable consequence of his and Jackson's conspiracy to escape.

His acquittals of the murders of the third correctional officer and of the prisoners were consistent with this theory, the evidence indicating that it was someone other than Spain or Jackson who killed the third officer and the prisoners.

"Because of the manner in which the indictment was framed,[4] it was necessary

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4. "'The Grand Jury of the County of Marin . . . accuses Stephen Mitchell Bingham, . . . John L. Spain [et al.], of a felony, to wit: conspiracy . . . in that (a) Stephen Mitchell Bingham and George Lester Jackson, now deceased, did prior to, and continuing on or about August 21, 1971 . . . conspire . . . together and with other persons whose names are unknown to the Grand Jury to . . . commit felonies, to wit: (1) The escape by force or violence . . . of George Lester Jackson and others . . . [etc. (describing other

(Footnote 4 continued on next page)

(and the trial court so ruled and instructed the jury) for the prosecution to prove that before August 21, there was a conspiracy between Jackson and one Stephen Bingham to effect Jackson's escape and that on August 21, Spain joined that conspiracy. In other words, if there were no conspiracy for Spain to join, he was not guilty of conspiracy and, therefore, not legally accountable for the murders.

(Footnote 4 continued)

felonies)]. (b) On or about August 21, conspiracy of Stephen Mitchell Bingham and George Lester Jackson and other persons . . . and did . . . conspire . . . with Stephen Mitchell Bingham and George Lester Jackson, and among themselves, for the purpose of . . . commit[ing] the felonies above described. . . '"

"The evidence that Jackson had planned, and with the assistance of a person or persons outside the prison prepared to escape, was clear. There was evidence that Spain was privy to these plans and assisted these preparations. But as to the central fact necessary to be proven, that Jackson and Bingham conspired, the evidence, while sufficient, is less compelling.

"The prison authorities were aware long before August 21 by virtue of a letter in Jackson's hand which had fallen into theirs, that he had encouraged others (not including Bingham) to smuggle weapons into the prison and to him and

otherwise to assist him to escape. After Jackson's death, another letter in his hand was found in the Adjustment Center; some references in the letter suggest it was written in or about early August 1971. The letter reveals that Jackson and 'the party' were planning an imminent escape and a variety of violent escapades, that some prisoners had 'thrown water' on the plans and, most significantly, that Jackson was already stockpiling weapons and had a gun.[5/]

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5. The letter stated: "They know that so it's a question of them facing the pigs guns they think or facing mine. They're trying for a shakedown so that I'll lose mine. . . ."

"On August 21, Jackson had two intended visitors, Bingham and a 'legal investigator,' Vanita Anderson. The latter brought into the prison a small tape recorder. She was frustrated in her attempt to see Jackson but, under circumstances which are ambiguous as to whether there was a prearrangement between them,[6] gave the recorder to Bingham just before his visit. Jackson, his hair, Bingham, Anderson, and her tape recorder were, according to the persons responsible for ensuring

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6. The officer in charge of the waiting room, who was aware that Anderson had a tape recorder, asked Bingham if he intended to use it "and he said no, and . . . Vanita Anderson . . . asked him if he wanted to use hers, and he indicated that he did. . . ."

that they carried no arms, closely searched before Jackson and Bingham's visit. Nevertheless, Jackson emerged from the visit with a bullet clip in his hair (actually an 'Afro' wig) and an automatic pistol underneath it. The prosecution's theory was that Bingham brought Jackson the gun in the tape recorder.

"The security arrangements relative to the interview were such that Jackson could have removed an object from the tape recorder without Bingham's active cooperation, but it is difficult to see how that act could have been performed without Bingham's knowledge. That knowledge would not be sufficient to make Bingham a party

to a conspiracy but it would be sufficient to explain his disappearance upon leaving the prison.

"When Jackson returned to the Adjustment center from the interview, the bullet clip was detected; whereupon, he removed the gun from under his wig and forced one of the four correctional officers, who were present to open the cells of other prisoners, many of whom emerged and some of whom--including, admittedly, Spain and Pinell, and, as shown by sufficient evidence, Johnson--played an active role in binding the officers and placing them in cells where they were assaulted. During the turmoil,

two other officers were admitted to the Adjustment Center and subjected to similar treatment. An officer accompanying the last to be admitted raised an alarm. Jackson and Spain then fled from the Adjustment Center. Jackson was shot and died instantly. Spain was located in some shrubbery in which he had taken cover. Order was restored in the Adjustment Center. One officer had bled to death from a neck wound; two had been shot to death; three others had their throats cut but survived; two prisoners died from similar wounds. A number of knives and improvised knives were found in various locations. No firearms

were discovered except Jackson's pistol.

"Spain is a black and was in August 1971 a member of the Black Panther Party. Jackson was also a member of the party, and it is reasonably probable that 'the party' of which he spoke in the letter which referred to his gun and his plan to escape was the Black Panther Party.

"The district attorney argued to the jury that the Black Panther Party had helped to smuggle weapons or ammunition to Jackson and implied that Spain's party membership was evidence that he, too, was 'involved in' the escape plan and 'working with' Jackson."

REASONS FOR GRANTING THE WRIT

Twelve years ago six persons died during an attempted escape at San Quentin Penitentiary. Respondent was convicted for the murders of two of those persons. During the trial one of the jurors approached the trial judge with the information that a person mentioned in passing by a defense witness might have killed a friend. The judge assured the juror that the person mentioned would not testify, as indeed he did not. After the trial the court held a hearing with all defendants and counsel present. The court ruled that the information possessed by the juror did not affect her ability to be fair and impartial. The state appellate courts concluded that the trial court's ruling was correct.

Eleven years after the murders, a district court rejected the conclusion

of the state courts, holding that the absence of an attorney when the juror approached the trial court required the granting of a writ of habeas corpus without a showing of prejudice. The Ninth Circuit Court of Appeals affirmed, ruling that the absence of a record made it impossible to determine the impact of the error.

Petitioner submits that the rulings of the lower federal courts have deviated from this Court's opinion in Smith v. Phillips, 455 U.S. 209 (1982). As in Smith, the trial court determined that the juror was fair and impartial. As in Smith, that factual finding by the state court, after a full and fair hearing, should have ended the matter.

This case is appropriate for this Court's plenary review because the disregard by this Circuit of federal-state relations, as defined by this

Court, is not an isolated instance. The refusal of the Ninth Circuit to accord due deference to factual findings by the state courts, together with importance of this case in terms of its age and the number of victims, makes a grant of certiorari by this Court imperative.

ARGUMENT

THE EX PARTE COMMUNICATION BETWEEN JUDGE AND JUROR DID NOT PREJUDICE RESPONDENT AND THEREFORE WAS HARMLESS BEYOND A REASONABLE DOUBT.

The district court held that a communication between the trial court and a jury during the course of the trial violated the right of the respondent to be present during the proceedings, and his right to be represented by an attorney. The court further held that the deprivation of the right to an attorney during a critical stage of the proceedings required automatic reversal; but even if it did not, the record did not establish that the error was harmless beyond a reasonable doubt.

The holding of the Ninth Circuit Court of Appeals is contained in the following paragraph:

> "The state court made no contemporary record of the

ex-parte communication between judge and juror or even of the fact that it took place. In this case the district court correctly concluded that the condition of the record made it impossible to apply intelligently the harmless error test. Chapman v. California, 386 U.S. 18, 22 (1967). The court's explanation of its decision to grant the habeas writ referred to the inadequacy of the state's record and the need for extensive speculation in determining the extent of the error. See Sumner v. Mata, 449 U.S. at 551. The harmless effect of conceded constitutional error cannot be established by speculation from a silent record." (Slip Op. at 3.)

Petitioner contends that the doctrine of harmless error was applicable to the identified error and that the record in the state courts, to which the district court erroneously failed to accord a presumption of correctness (28 U.S.C. § 2254(d); Sumner v. Mata, 455 U.S. 591 [1982]), established that the error was harmless beyond doubt. Before delineating these arguments at length, petitioner reviews the operative facts.

A. The Facts

At a hearing on a motion for a new trial held on September 30, 1976, Juror Patricia Fagan testified that she had been born and raised in Los Angeles, leaving that area to come to Concord in 1968 (SRT 23946-23951).[7/] While growing

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7. "SRT" refers to the Reporter's Transcript of the proceedings in state court.

up in Los Angeles, Fagan knew Carolyn Olson, whom she termed a "good friend but not a close one" (SRT 23949). Fagan stated that, although she cared for Olson's little girl while Olson attended U.C.L.A., they did not see each other socially as adults (SRT 23948-23949).

In 1968, while in Concord, Fagan learned that her childhood friend had been slain (SRT 23951-23952). A cousin subsequently advised her that Olson had been killed by members of the Black Panther Party (SRT 23954).

During voir dire of potential jurors on June 12, 1975, Fagan was asked: "Q. How about crimes of violence? Any knowledge of that at all? A. No. [¶] Q. Witness, victim, otherwise? A. No." (Ct.App. Opinion at 9.) Later appellant Spain's attorney queried: "Q. Have you heard of the Black Panther Party? A. Yes. [¶] Do you associate the Black

Panther Party with any form of violence in your own mind? A. No." Ct.App. Opinion at 9.

Louis Albert Tackwood testified in behalf of petitioner Spain in April of 1976 (SRT 18224-18792). Several times he stated that Elmer "Geronimo" Pratt was a police informant who was assigned to help George Jackson to escape from custody on August 23, 1971. Tackwood claimed that Pratt, the members of his "hit squad," and Jackson would have been assassinated by police (SRT 18334-18337, 18352). Pratt was later identified as a leader in the Los Angeles branch of the Black Panther Party (SRT 18305).

During the course of his cross-examination, the prosecutor asked Tackwood whether he was aware that Pratt had been "wanted for the robbery and murder of a woman in Santa Monica" (SRT 18640). As a result of the question,

juror Fagan went to the chambers of the trial judge at the close of that day's proceedings to inform him that she believed that it was her friend whom Pratt had killed (SRT 23957). She had never before heard Pratt's name (SRT 23954), but since Carolyn Olson had been killed in Santa Monica by a Black Panther, she thought that it might have been more than a coincidence (SRT 23956-23957). Fagan told the judge that she might cry if the death of her friend was explored further in court (SRT 5481; SRT 23977). She later explained that she feared that she might break down in court because she was "a very emotional person" (SRT 23977). The judge advised her "that I do not consider that a matter of significance, and told her that she should simply forget about it. I didn't think the matter would be gone into at all" (SRT 23919).

That evening Patricia Fagan learned from her mother that Elmer Pratt had been convicted of murdering Carolyn Olson (SRT 23972). She did not otherwise discuss the trial with her mother, confining her questions to the identity of the slayer of her childhood friend (SRT 23973). The following morning Fagan informed the judge that in fact Pratt had killed her friend. She again warned that she might lose composure if the death of her friend was the subject of testimony at trial (SRT 23820; SCT 5481). When the judge reassured her that Pratt probably would not be discussed further, Fagan told the judge "that the information regarding Pratt and my friend would have no adverse effect on me, and played no part in my evaluation of this case" (SCT 5481-5482). She did inform other jurors that Pratt had killed a friend (SRT 23972), "but no comments derogatory of the Black Panther

Party were made by me or anyone else in my presence" (SCT 5482).

Fagan later averred that her statements during voir dire were truthful. "I have not been a victim of, or witness to such crimes [of violence], and at the time I answered the question, the death of my friend in Santa Monica was not in my mind" (SCT 5482).

With regard to the Black Panther Party, her knowledge "was primarily limited to a breakfast program for school children conducted by that organization in the Los Angeles area. Therefore, I associate the Black Panther Party with worthwhile activities" (SCT 5482).

The trial court denied the motion for a new trial (SRT 24014). The court ruled that Pratt's conviction for the murder of Fagan's friend lacked evidentiary significance because Pratt did not

testify at trial (SRT 23985). The court also found that Fagan did not intentionally conceal the death of her friend during voir dire (SRT 24013).

B. The Error and the Applicability of the Harmless Error Doctrine.

Taken together, the opinions of the district court and Court of Appeals hold: (1) the ex parte communication between judge and juror violated respondent's right to be present with counsel; (2) there was no adequate record of the contents of those communications; (3) therefore, the error was reversible without an attempt by the courts to assess prejudice. Petitioner submits that the record was adequate and established beyond doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 24 (1967).

The district court found that the ex parte communication between judge and juror violated respondent's right to be

present with counsel. Dist. Ct. Opinion 11-16. Petitioner always has acknowledged that the better practice would have been for the trial court to have held a hearing immediately, with respondent and counsel present, when the juror approached him. See, e.g., Faretta v. California, 422 U.S. 806, 819 n.15 (1975) (right to be present); Badger v. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978) (same); United States v. McCoy, 429 F.2d 739, 742 (D.C. Cir. 1970) (right to counsel). The district court correctly held that the violation of the right to be present is to be judged under the harmless error standard. Dist. Ct. Opinion at n.9; United States v. Taylor, 562 F.2d 1345, 1365 (2d Cir.), cert. denied, 432 U.S. 909 (1977). However, the district court also held that the deprivation of the right to counsel "dictates the automatic

reversal of Spain's conviction." Dist. Ct. Opinion at 17. Petitioner emphatically disagrees.

The district court's ruling totally disregarded decisional law. Courts have held to be harmless the absence of the accused or his attorney, or both, during a communication between the trial court and a juror. See United States v. Cassasa, 588 F.2d 282, 285 (9th Cir. 1973); United States v. Boscia, 573 F.2d 827, 831-832 (3rd Cir. 1978); United States v. Parker, 549 F.2d 998, 1000 (5th Cir. 1977); United States v. Rodriquez, 545 F.2d 829 (2d Cir. 1976); United States v. Jones, 542 F.2d 186, 213 (4th Cir. 1976); United States v. Jones, 542 F.2d 196, 213 (4th Cir. 1976); United States v. Doe, 513 F.2d 709, 711 (1st Cir. 1975); United States v. Reynolds, 489 F.2d 4, 7-8 (6th Cir. 1973); United States v. Neff, 475 F.2d

861 (3d Cir. 1973); United States v. Arrigada, 451 F.2d 487, 489 (4th Cir. 1971); Henderson v. United States, 419 F.2d 1277 (5th Cir. 1970); United States v. Larkin, 417 F.2d 617 (1st Cir. 1963); Bacino v. United States, 316 F.2d 11, 13-14 (10th Cir. 1963); see also Rogers v. United States, 422 U.S. 35, 40 (1975) (dictum).

This Court has recognized that certain violations of the right to counsel may be disregarded as harmless error. United States v. Morrison, 449 U.S. 361, 365 (1981). For example, Coleman v. Alabama (1970) 339 U.S. 1, held that an accused had the right to an attorney at a preliminary hearing, but recognized that error could be harmless if evidence developed at the hearing was not used at trial. Id. at 10-11 & n.5. A post-indictment lineup is a critical stage requiring the presence of counsel.

United States v. Wade (1967) 388 U.S. 218; Gilbert v. California (1967) 388 U.S. 263. Yet denial of counsel can be harmless if the state can prove convincingly that the in-court identification was not the product of the lineup (United States v. Wade, supra, at 240) and if evidence of the lineup itself is excluded (Gilbert v. California, supra, at 272-74). Indeed, even if such evidence is introduced, it can be harmless. Id.; see also Moore v. Illinois (1978) 434 U.S. 220, 232.

Thus, deprivation of counsel can be harmless if the resulting taint infected only one stage of the proceedings rather than the entire prosecution as in Gideon v. Wainwright (1963) 372 U.S. 335. The harmless error doctrine is then available to determine whether the localized taint had affected the jury's deliberations and

decision. As this Court said in Morrison:

> "Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward

> with full recognition of the defendant's right to counsel and to a fair trial." 449 U.S. at 365.

Applying this principle to the present case, we submit that respondent is entitled to no relief if it can be demonstrated that the absence of counsel during the communication between judge and juror was harmless error. We submit that the record of the state trial affirmatively establishes that the error was harmless beyond a reasonable doubt. Proof of the total lack of prejudice suffered by respondent comes from the sufficiency of the hearing on the communication held after the trial. The post-trial hearing established what would have been proven if the hearing had been held immediately: (1) the information of which juror Fagan was aware was irrelevant to any issue developed during trial; (2) the juror was

shown to be fair and impartial. We now turn to a consideration of these issues.

C. Communications Between Judge and Jury Did Not Prejudice Respondent.

The state court record establishes beyond doubt that respondent was not prejudiced by the communications between the trial judge and the juror. The issue of prejudice must be approached from two different directions. First, the content of the communication must be assessed to determine whether it related to some fact in controversy which arose in the trial. See, e.g., Rogers v. United States, supra, 422 U.S. at 40. Second, the communication and the contacts between judge and juror must be evaluated for their relevance to the question of the juror's fitness to serve. Petitioner submits that the information possessed by the juror was irrelevant to any issue developed at

trial and had no impact on the juror's ability to be fair and impartial.

1. The Contents of the Statement

We believe that Parker v. Gladden (1966) 385 U.S. 363, identifies the interests of the accused which are sought to be protected by the rule against ex parte communications with jurors. Quoting from Turner v. Louisiana (1965) 379 U.S. 466, 472-73, this Court stated that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 385 U.S. at 364. Thus, the danger of ex parte communications is that the juror may receive incorrect information about either the facts or the law of the case (cf. United States v. Treatman [8th Cir. 1975] 524 F.2d 320, 323; United States v.

Marken [9th Cir. 1972] 457 F.2d 186, 188; Holmes v. United States [4th Cir. 1960] 284 F.2d 716, 718-19, or may be influenced by the attitude or instructions of the court. Cf. Shields v. United States (1927) 273 U.S. 583, 587-88; United States v. Glick (2d Cir. 1972) 463 F.2d 491, 494; Rice v. United States (8th Cir. 1966) 356 F.2d 709, 715-17. It is to prevent such misinformation or undue influence that the rights to counsel and confrontation are applicable to exchanges between judges and juries. See, e.g., United States v. Taylor, supra, 563 F.2d at 1365.

It follows, then, that the accused has not been prejudiced by the impermissible communication if the record clearly demonstrates that the juror has not received information pertinent to the case and has not been influenced on

the ultimate issue of guilt or innocence.

The record in this case shows that Fagan received no information from the trial judge at all. Rather, it was she who advised the judge what she remembered about Geronimo Pratt. If she had remained silent about the incident of her friend's death, this issue never would have arisen. Indeed, even if she had used the irrelevant fact in deciding to convict respondent, he would not be entitled to relief. As he has repeatedly pointed out, a verdict may not be impeached with evidence of the mental process of a juror. Cal. Evid. Code § 1150; Fed. Rules of Evid. Rule 606(b).

This issue has emerged only because juror Fagan forthrightly advised the trial judge that a name mentioned during the proceedings evoked distant memories.

Her decision to come forth was commendable and cuts against any claim of prejudice on her part. Viewed in this context, the issue of the ex parte communication really is no issue at all. Fagan learned nothing from the judge which she did not previously know. The record in this case thus conclusively demonstrates a total lack of prejudice to respondent. The subject of the conversation between Fagan and the trial court was unrelated to any fact in controversy. Cf. United States v. Boscia, 573 F.2d 827, 831 (3d Cir. 1978); United States v. Burke (5th Cir. 1974) 496 F.2d 373, 377. The fact that Elmer Pratt murdered Carolyn Olson in Santa Monica in 1968 was totally irrelevant to the prosecution of the crimes committed in San Quentin on August 21, 1971. The murder committed by Pratt had nothing to do with the introduction of a

gun into San Quentin by Stephen M. Bingham. It had nothing to do with the transfer of the weapon to George L. Jackson. It had nothing to do with the concealment of the weapon under a wig on Jackson's head. It had nothing to do with the introduction of the gun into the Adjustment Center, to the amazement of startled guards who were told by Jackson that the "dragon had come."

Olson's death was not related to the ensuing slaughter in the Adjustment Center. Her death was not related to the deaths of Paul Krasenes, Frank DeLeon, Jere Graham, Ronald Kane, and Johnny Lynn. Her death was not related to Jackson's desperate bid for freedom and subsequent death.

Pratt's murder of Olson did not affect the defense of respondent, who claimed diminished capacity and "counter conspiracy". Since Pratt was not called

as a witness, his commission of a murder in 1968 did not impeach his credibility. Regarding his credibility, it is worth noting that there was substantial evidence adduced at trial that Pratt was an outlaw (SRT 18065, 18096, 18597, 18617, 18641).

Pratt's slaying of Olson had no relevance to the credibility of Tackwood. He was impeached by the self-contradictory and incredible nature of his testimony. References to Elmer Pratt are a minuscule part of the fabric woven by the fantastic quality of his claims at trial. Even if his testimony had been believed, it would have made no difference. Respondent's convictions of murder and conspiracy are based on a conspiracy between Jackson and Bingham. There is no connection between Pratt and Bingham in the record, and none was ever asserted. No evidence even remotely

suggested that Bingham was a state agent who lured Jackson into the escape attempt. At most, Fagan had second-hand knowledge about a crime committed seven years earlier by a shadowy figure who played no part in the offenses of which appellee was convicted.

Finally, returning to a consideration of the policies behind the prohibition of ex parte communications, we note that the trial court gave no information to Fagan regarding to the facts or the law (cf. United States v. Reynolds [6th Cir. 1973] 489 F.2d 4, 7-8); nor did the court attempt to influence the juror. Rather, the court sought only to reassure Fagan that the mention in court of the name of a man who might have killed her childhood friend was no cause for concern. Cf. United States v. Neff (3d Cir. 1973) 475 F.2d 861.

We therefore submit that the contact between judge and juror was not of the species which the prohibition against ex parte communications seeks to prevent. Juror Fagan came away from her meeting with the trial court with no new information or bias. Beyond doubt the communication did not prejudice respondent.

2. Juror Bias.

The courts below held that the communication between the judge and juror raised a question regarding the latter's fitness to serve, a question which was not resolved during the trial. Petitioner submits that the question of Fagan's impartiality was fully and fairly litigated in the state courts. She stated during voir dire that she could be fair and unbiased. During the motion for new trial she testified that she was not biased toward petitioner or the Black Panthers. Both the trial

court and court of appeal determined, after a full and fair hearing with the revelation of all pertinent facts, that Fagan was a fair and impartial juror. We believe that the state courts' finding is entitled to a presumption of correctness which was not rebutted by respondent. 28 U.S.C. § 2254(d); Wade v. Jones, 192 F.Supp. 333 (W.D. Ky. 1961). The error in the opinions of the lower courts is in their premise that a record should have been made at the time of the ex parte communication and that any record made afterward was inadequate. Petitioner contends that the post-trial record was adequate to establish juror Fagan's fitness to serve.

Smith v. Phillips, 455 U.S. 209 (1982), provides persuasive support for our position. In Smith, one of the jurors during trial submitted an application to the district attorney's office

for employment as an investigator. The prosecuting attorneys were advised of this application during the trial but did not disclose this information to the trial court or defense counsel. When the matter was brought to light after the verdicts, the trial court held a hearing at which the juror testified. The trial court found that the juror had not reached a premature conclusion about the defendant's guilt or was otherwise prejudiced against him. 455 U.S. at 213-214.

This Court upheld the convictions, holding that the hearing was legally adequate to determine the juror's fitness to serve. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such

occurrences when they happen. Such determinations may properly be made at a hearing like that . . . held in this case." Id. at 217. This Court noted that the determination of the juror's bias vel non will frequently turn upon the testimony of the juror in question, but nevertheless held that it was admissible. Quoting from Dennis v. United States, 339 U.S. 162, 171 (1950), this Court noted that "'[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.'" 455 U.S. at 217 n.7; see also Remmer v. United States, 347 U.S. 227, 230 (1954).

The defendant argued that, had the prosecutors disclosed the application for employment during the trial, the trial

court could have replaced the juror with an alternate. This Court rejected this position: "This argument proves too much. If the hearing and determination to replace a juror during trial would have adequately protected [the defendant's] right to due process of law, and would not have been rendered impossible by necessary reliance on the juror's own testimony, we see no reason why a post-trial hearing and determination would be any less protective or possible." 455 U.S. at 218 n.8.

In the present case, after a post-trial hearing at which Fagan testified, the trial court determined that there was no juror bias which deprived appellee of due process of law. Under Smith v. Phillips, supra, the finding that Fagan was not biased was a factual determination which the district court

should have accepted and this Court must now accept.

The Ninth Circuit Court of Appeals based its affirmance of the district court's grant of habeas corpus upon the fact that a hearing was not held immediately after the relevations by the juror to the judge. But this Court said that it did not matter whether the hearing was held during or after trial. 455 U.S. at 218 n.8. In Remmer v. United States, supra, for example, the FBI investigated during trial the attempted bribery of a juror and submitted a report to the judge and prosecutor without disclosure to defense counsel. Rather than require a new trial, this Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudiced, in a hearing with all interested parties

permitted to participate." 347 U.S. at 230. Thus, a post-trial hearing can be constitutionally adequate to reveal whether a mid-trial irregularity is prejudicial.

C. The Importance of This Case.

It should be clear from all of the above that respondent was accorded a fair trial in California Superior Court. A hearing established that the juror who approached the judge during the trial had received no ex parte information bearing upon the issues raised at trial and was able to discharge her duties with fairness and impartiality. There remains only the question of why this Court should accept this case for plenary consideration.

We are well aware that this Court, which must devise rules for, and give legal guidance to, every judicial forum in this land cannot accept a case for

review simply because it was incorrectly decided. But more, much more, is at stake here. It is not merely that the trial lasted 18 months and cost the People of the State of California over $1 million. Nor is it that the crimes involved, which left five people dead, occurred almost twelve years ago and may be difficult to prove upon retrial. Rather, this case is a singular example of the failure, if not outright refusal, of some federal courts to accept this Court's leadership in the area of federal-state relations.

This Court's decisions have articulated a clear policy of protecting the Constitutional rights of those charged with crimes in state courts while respecting the interest of the states in the finality of their criminal trials and minimizing friction between the federal and state systems of justice.

See Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring). This balancing of interests is largely maintained by requiring that the state's fact-finding process be reliable. If that process admits reliable evidence and provides a method for the correction or elimination of error, then judgments produced by that process will not be disturbed. See, e.g., Engle v. Isaac, 456 U.S. 107 (1983); Rose v. Lundy, 455 U.S. 509 (1982); Smith v. Phillips, 455 U.S. 209 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976). The courts in the Ninth Circuit do not seem to have comprehended this policy. See, e.g., Sumner v. Mata, 455 U.S. 591 (1982), rev'g. Mata v. Sumner, 649 F.2d 713 (9th Cir. 1981); Sumner v. Mata 449 U.S. 539 (1981), rev'g. Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979).

This case cries out for the corrective process which only this Court can now provide. Once again, the courts of the Ninth Circuit have ignored the reliability of the fact-finding process of California courts and the use of that process in this case to determine the fairness and impartiality of the juror. Finally, we respectfully remind this Court of its recent comments about the ordeal imposed upon victims of crimes by a subsequent trial:

> "Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and

the witnesses; the Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a

> single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources." Morris v. Slappy, ___ U.S. ___, 51 U.S.L.W. 4399, 4403 (1983).

Is it fair to ask victims of violent crimes to testify again about events 12 years old when a full and fair hearing in state court established the impartiality of the first jury? We think not, and respectfully request this Court to reverse the decision of the Ninth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be granted.

DATED: June 3, 1983

JOHN K. VAN DE KAMP,
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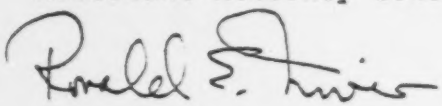
State of California

WILLIAM D. STEIN
Assistant Attorney General



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY SPAIN, Appellee, v. RUTH RUSHEN, Director, California Department of Corrections, JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California, Appellants.	)	No. 82-4358 D.C. No. Cv-81-4858 M E M O R A N D U M

Appeal from the United States District Court for the Northern District of California
Honorable Thelton E. Henderson, District Judge, Presiding
Argued and submitted January 10, 1983

BEFORE: GOODWIN and SNEED, Circuit Judges, and JAMESON, District Judge*

California appeals the district court's grant of Spain's petition for a

* The Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

Spain was one of six prison inmates involved in a 1971 escape attempt apparently planned by prisoner George Jackson. Jackson, three corrections officers, and two other prisoners were killed in the attempt.

Spain and five other inmates were tried on charges including assault, conspiracy and murder. During voir dire, defense counsel asked lengthy questions about prospective jurors' knowledge of crimes of violence and their perceptions of the "Black Panther Party." Spain was the only defendant who was a "Black Panther."

Spain was convicted of conspiracy to escape and murder of two of the three corrections officers. He was found not guilty of assault and of other counts in the indictment.

Late in the year-long trial the judge met twice in chambers with juror Patricia Fagan. Fagan first expressed concerns about her emotional responses if a defense witness gave testimony that linked a Black Panther who was unrelated to the trial to the murder of one of her friends several years earlier in Santa Monica. The trial judge did not inform the parties or counsel about these concerns of the juror Fagan, nor did the trial judge tell counsel about a second visit by the juror who admitted to the judge that she had told some other jurors about her friend's death at the hands of a Black Panther. Counsel thus had no opportunity at the time to question Fagan about bias, or to inquire whether other jurors might have been biased by Fagan's disclosures. The trial judge made no record of his conversations with Fagan.

California concedes that the ex-parte communication between the trial judge and juror violated Spain's Sixth and Fourteenth Amendment rights to presence and assistance of counsel at critical stages of tne proceedings. But the state contends that the errors were harmless beyond a reasonable doubt.

In habeas proceedings a district court is to presume correct the findings of fact of state courts. Sumner v. Mata, ___ U.S. ___, 102 S.Ct. 1303, 1306-7 (1982). The state court's findings must be fairly supported by the record. Sumner v. Mata, 449 U.S. 539, 550 (1980). In order to determine whether constitutional error is harmless, its scope must be readily identifiable on review. Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

The state court made no contemporary record of the ex-parte communication

between judge and juror or even of the fact that it took place. In this case the district court correctly concluded that the condition of the record made it impossible to apply intelligently the harmless error test. Chapman v. California, 386 U.S. 18, 22 (1966). The court's explanation of its decision to grant the habeas writ referred to the inadequacy of the state's record and the need for extensive speculation in determining the extent of the error. See Sumner, 449 U.S. at 551. The harmless effect of conceded constitutional error cannot be established by speculation from a silent record.

We need not reach Spain's second point: that he was denied a fair trial because He was shackled during all his appearances in state court following his indictment.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHNNY SPAIN

vs.

RUTH RUSHEN et al.

Civil Action File No.
C 81-4858 TEH

JUDGMENT

This action came on for hearing before the Court, Honorable Thelton E. Henderson, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the petition for writ of habeas corpus is granted.

Dated at _____,

_____, this _____ day

of _____, 19___.

_____

Clerk of the Court

By _____

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY SPAIN, Petitioner, v. RUTH RUSHEN, Director, California Department of Corrections, JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California, Respondents.	)	NO. C 81-4858 TEH

OPINION AND ORDER

This case is before the Court on Spain's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Petitioner claims that he is in custody pursuant to a judgment of conviction that is constitutionally defective as a result of events that occurred at his trial. First, Spain contends that ex parte communications that took

place during his trial between a juror and the trial judge deprived him of his constitutional rights to assistance of counsel and to be present at a critical stage of his trial. Second, the Petitioner asserts that his Due Process right to be presumed innocent at trial was violated when he was forced to stand trial while shackled and chained. For the reasons set forth below, this Court is compelled to issue the writ.

I. FACTS

The petition for writ of habeas corpus arises out of Spain's trial as one of a group of defendants popularly known as "The San Quentin Six." The trial, which began in 1975, concerned August, 1971 events at San Quentin Prison that resulted in the death of George Jackson and five others. At the time these events occurred, Petitioner Spain was

incarcerated on a first degree murder conviction.

The indictment on which the defendants were tried contained twelve counts' including conspiracy to escape by force or violence, assault, and murder in the deaths of two prisoners and three correctional officers. All of the defendants were charged and tried on the conspiracy and murder counts. The trial began on March 25, 1975 and ended on August 12, 1976 after twenty-four (24) days of jury deliberation. Three of the six defendants were acquitted on all counts. One was convicted of one count of assault, and another of two counts of assault. The remaining defendant was Johnny Spain.

Spain, the only defendant who was a member of the Black Panther Party, was the only defendant convicted of conspiracy and/or murder. On a theory of

vicarious liability arising out of the conspiracy conviction, Spain was convicted of murder in the deaths of two of the three correctional officers who died in the escape attempt allegedly led by George Jackson. People v. Spain, Pinell, and Johnson, No. 1/Crim. 16126 at 2 (California Ct. App., July 24, 1980) [hereinafter cited as Ct. App. Opinion]. Consistent with the vicarious liability theory, Spain was acquitted of murder in the deaths of the third correctional officer and the two prisoners. Id.

The relevant portions of the record at trial and on appeal have been lodged with the Court[1/] and thoroughly reviewed.

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1. The records referred to were lodged with the Court in connection with the case of Spain v. Rushen, et al., C 81-2738 TEH, which was dismissed without prejudice by this Court on November 24, 1981. See discussion of Procedural Background, this Opinion, infra, at pages 9-10. The earlier case

(Footnote continued on next page.)

The facts bearing on the petition are not in dispute and are set out in detail in the parties' able briefs and in the unpublished opinion of the California Court of Appeal affirming the convictions of Spain and the other two convicted defendants, People v. Spain, Pinell, and Johnson, No. 1/Crim. 16126 (July 24, 1980). To the extent that factual findings pertinent to the issues raised here were made by the California Court of Appeal, those findings are presumed to be correct. Sumner v. Mata, ___ U.S. ___, 102 S.Ct. 1303, 1306-07 (1982) (per curiam), 28 U.S.C. § 2254 (d).

Footnote 1 continued:

is related to the instant action within the meaning of Local Rule 205-2(b), and judicial notice is hereby taken of the entire record in C 81-2738 TEH. Fed. R. Evid. 201.

With respect to the ex parte communications between judge and juror, the facts are as follows. Jury selection took thirty-nine trial days. The sensational nature of the 1971 events and the Black Panther membership of George Jackson and Petitioner Spain prompted voir dire concerning both violence and perceptions of the Black Panther Party. The California Court of Appeal described the pre-trial voir dire as follows:

> Fagan [the juror who had ex parte communications with the trial judge], during the voir dire of the venire, was shown a videotape of the trial judge's admonishing prospective jurors of the importance of revealing any association with crimes of violence and attitudes toward radical groups, specifically the Black Panther Party. Fagan was asked:
>
> "Q. How about crimes of violence? Any knowledge of that at all?
> "A. No.
> "Q. Witness, victim otherwise?
> "A. No.
> ". . . . . .

"Q. Have you heard of the Black Panther Party?
"A. Yes.
"Q. Do you associate the Black Panther Party with any form of violence in your own mind?
"A. No."

Ct. App. Opinion at 9.

During the defense case at trial, a witness for Spain testified that the 1971 events for which Spain and the other defendants were on trial resulted from a police plot to eliminate a group of Black Panthers by setting up a Panther "rescue" of George Jackson and then ambushing the entire group. The witness identified a Black Panther named Pratt as a police informant involved in the plot as leader of the "rescue" group. Pratt, however, had been in custody for the 1968 murder of a Santa Monica woman during the entire period of the alleged rescue plot. This information about Pratt's whereabouts and the

reasons therefor was used to impeach the defense witness on cross-examination. Id. at 9-10; see also Examination of Juror Fagan at Post-trial hearing, Trial Court Transcript 23957: 2-8 [hereinafter cited as C.T.].

During a recess on the day of this cross-examination, Juror Patricia Fagan went to the chambers of trial Judge Henry J. Broderick and told him that she suspected that the murder referred to in cross-examination was the murder of her friend, Carolyn Olson, by a Black Panther Party member. Record on Appeal, 5480:28 - 5481:13 [hereinafter cited as R.App.]; C.T. 23919:7-11; Ct. App. Opinion at 10. Ms. Fagan told the judge that, if the matter were gone into further, she might start to cry in the courtroom. R.App. 5481:13-14; Ct. App. Opinion at 10. Judge Broderick indicated that it was unlikely that the 1968 murder referred

to was that of her friend and told Ms. Fagan not to concern herself with it. R. App. 5481:14-17; C.T. 23919:25-28; Ct. App. Opinion at 10. The judge also asked Ms. Fagan whether Pratt's association with her friend's murder would affect her disposition of the case. Ms. Fagan responded in the negative. C.T. 23919:20-24, Ct. App. Opinion at 10. No record was made of the conversation and neither the parties nor their counsel were informed of its occurrence at the time it took place. Ct. App. Opinion at 11.

That evening, Ms. Fagan asked her mother the name of the person who killed her friend Olson, and her mother informed her that it was Pratt. R.App. 5481:18-20; Ct. App. Opinion at 10.

The next day, Ms. Fagan went to see Judge Broderick again to inform him that she had confirmed that the testimony

given on the previous day related to the death of her friend. R.App. 5481:21-23; C.T. 23920:1-4; Ct. App. Opinion at 10-11. Ms. Fagan reiterated the effect that renewed discussion of the 1968 murder might have on her composure. R.App. 5481:23-25; C.T. 23920:4-101 Ct. App. Opinion at 11. The judge advised Ms. Fagan that the lawyers probably would not go into the matter further, and asked again whether Ms. Fagan's disposition toward the case would be affected by the information in her possession. Id. Ms. Fagan responded that she would be very unsettled if Pratt were called to testify. Id. No record of this second conversation was made and none of the parties was informed of its occurrence. Ct. App. Opinion at 11.

Juror Fagan's second conversation with Judge Broderick took place on Friday. Evidence was presented the

following Monday, the next trial day, that Pratt was a leader of the Black Panther Party in Los Angeles. Id. at 12.

Despite the cross-examination question posed by the prosecutor concerning Pratt's incarceration for murder, no admissible evidence was introduced that Pratt in fact had killed or been convicted of killing Carolyn Olson. Id. at 11. Juror Fagan, however, told other jurors that Pratt had been convicted of murdering a friend of hers. R.App. 5482:2-3; Ct. App. Opinion at 11; see also Examination of Juror Fagan at post-trial hearing' C.T. 23971:24 - 23972:1, 23978:27 - 23979:1.[2/] Ms. Fagan, in an affidavit submitted in opposition to

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2. The record is unclear as to when, precisely, Ms. Fagan conveyed this information to other jurors, though it was clearly before the verdicts were reached.

Spain's motion for a new trial, denied that she made any derogatory comments about the Black Panther Party in her conversations with other jurors concerning the death of her friend. R.App. 5482:2-7; Ct. App. Opinion at 11.

Following the testimony pertaining to Pratt, Spain presented evidence of his Black Panther Party membership. Ct. App. Opinion at 12. In his closing statement, the prosecutor argued to the jury that the Black Panther Party helped to smuggle weapons or ammunition to Jackson "and implied that Spain's party membership was evidence that he, too, was 'involved in' the escape plan and 'working with' [George] Jackson." Id. at 5-6.

Counsel for Spain learned of the conversations between Juror Fagan and Judge Broderick after the jury returned its verdict. A motion for new trial based on these conversations was promptly filed.

P.App. 5437 et seq. Ms. Fagan's affidavit was submitted as part of the record at the hearing on the new trial motion, at which Ms. Fagan testified. In her affidavit, Ms. Fagan stated that she associated the Black Panther Party with worthwhile activities and that at the time of pre-trial voir dire the death of her friend was not in her mind. R.App. 5482:7-18. No other jurors testified at the hearing on the motion for a new trial, at which Judge Broderick presided. The motion was denied in October, 1976. C.T. 24013:12-24014:7.

The pertinent facts with respect to the shackling of the Petitioner at trial are as follows: Spain was indicted in October, 197). From the time of his indictment through his conviction in 1976, the Petitioner was shackled during his appearances in state court. Prior to leaving his cell each morning, Spain,

like the other incarcerated defendants, was placed in leg irons and belly chains, and his hands were bound to his waist chain through the use of additional chains and handcuffs. Once in the courtroom, Spain's waist chain was shackled to his chair, which was bolted to the floor. Beyond these restraints applied to the individual defendants, an elaborate system of courtroom security was employed, including guards armed with machine guns, a bullet proof barrier' body frisks, and metal detectors.

During the pre-trial period, defendants, including Spain, filed several motions requesting that they be unshackled, all of which were denied. See, e.g., C.T. 1161, 1165-66. A motion to reconsider the question of shackling at trial was filed on March 7, 1975 and denied on March 14, 1975. The jury trial commenced on March 25, 1975 with the

defendants shackled in the manner described above.

During the course of trial, Judge Broderick made no express finding as to why Petitioner Spain was shackled. On October 1, 1976, just prior to sentencing, the trial judge orally addressed the subject of the restraints imposed during trial. C.T. 23994-24003. Petitioner Spain's attorney objected to the judge's statements on the ground that the court should not be permitted to state self-serving reasons for its actions at such a late date, having refused to hold a hearing on the question of restraints during trial. Judge Broderick, however, expressed concern that the appellate court be able to review the decision to maintain the physical restraints during trial. Judge Broderick therefore introduced into evidence two court exhibits documenting the

reasons for his decision with respect to shackling. Court Exhibit 17 is a bound volume entitled "Composite Behavior Report," consisting of security incident reports submitted to Judge Broderick during the trial. Exhibit 18 is a set of videotapes of misconduct by the defendants during the trial.[3/]

Exhibits 17 and 18 reveal that, while the trial was in progress, Petitioner Spain engaged in the following misconduct:

1. Throwing a file toward the jury as jurors were being sworn. June 12, 1975.

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3. The existence of Exhibits 17 and 18 came to the attention of this Court after the March 15, 1982 hearing on the Order to Show Cause. The Court promptly contacted the Deputy Attorney General handling this case on behalf of the State of California. As the result of the State's diligent efforts, a copy of Exhibit 17 and the original of Exhibit 18 were obtained and lodged with the Court on May 21, 1982.

2. Generalized threat to a correctional officer while at San Quentin. ("What goes around comes around.") June 12, 1975.
3. Throwing spitballs at court participants. June 23, 1975.
4. Handing defendant Pinell a pencil thereafter thrown by Pinell towards the well of the courtroom following the close of the day's proceedings. June 24, 1975.
5. Making noise by rubbing chains across chair arm during reading of the indictment. July 28, 1975.
6. Urinating on courtroom floor while waiting to be returned to San Quentin after close of the day's proceedings. January 30, 1976.

7. Throwing "unknown instrument" at opening in cell door at San Quentin, striking the hand of a officer was walking by. February 27, 1976.

9. Intentionally bumping defendant Talamantez while in transit from San Quentin to court. February 27, 1976.

10. Throwing water at six security officers who were restraining a codefendant during court recess. April 12, 1976.

11. Indecent and unacceptable verbal responses to questions from correctional officers at San Quentin, resulting in security incident report on May 13, 1976.

12. Illegal possession of medication at San Quentin. June 21, 1976.

13. Yelling threat and obscenities at correctional officers at San Quentin. July 12, 1976.

14. Verbal belligerence with security officers during court recess. July 12, 1976.

The initial decision to shackle Petitioner Spain was made at his indictment, before any of Petitioner's disruptive acts occurred. The decision to keep Spain in shackles throughout the trial was presumably based on Spain's conduct in the courtroom and on the out-of-court behavior reported to Judge Broderick by the security team at San Quenton, all of which is itemized in chronological order in the foregoing list.

II. PROCEDURAL BACKGROUND

Petitioner Spain filed a notice of appeal to the California Court of Appeal on October 1, 1976, the same day that

the judgment of conviction was entered against him. R.App. 5507-5508, 5512. Nearly four years later, Spain's conviction was affirmed by the Court of Appeal, which considered both of the issues raised by the instant petition. With respect to the ex parte communications between Juror Fagan and the trial judge, the state appellate court found that though federal constitutional error was committed, that error was shown by the State to be harmless beyond a reasonable doubt. Ct. App. Opinion at 13-19. As to the shackling of the defendants at trial, the Court of Appeal ruled that even if the shackling were assumed to constitute a due process violation, the resulting error was not prejudicial to the defendants. Id. at 19-20.

The California Court of Appeal opinion was filed on July 24, 1980. A Petition for Hearing before the California

Supreme Court was served on September 2, 1980. The California Supreme Court denied a hearing, issuing an order to that effect on October 15, 1980.

On June 29, 1980, Spain filed a petition for writ of habeas corpus in this Court, raising issues identical to those now before the Court. Spain v. Rushen, et al., C 81-2738 TEH. At a November 2, 1981 hearing on that petition, counsel were alerted to the Court's concerns regarding exhaustion of state remedies on the shackling issue. Spain promptly filed, on November 5, 1981, a petition for writ of habeas corpus raising the shackling issue in the California Supreme Court.

On November 24, 1981, this Court dismissed without prejudice Spain's petition in C 81-2738 TEH for failure to exhaust state remedies on the shackling

issue.[4/]

On December 23, 1981, the California Supreme Court denied without a hearing Spain's petition for writ of habeas corpus. In re Johnny Spain, Crim. No. 22325 (Cal. Sup. Ct. Dec. 23, 1982). On December 31, 1981, Spain filed the petition that is now before the Court. A hearing in this case was held on March 15, 1982. With this procedural and

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4. The Ninth Circuit's "total exhaustion" rule, which this Court viewed as mandating dismissal of Spain's earlier-filed petition, has since been adopted by the United States Supreme Court. Rose v. Lundy, ___ U.S. ___, 102 S. Ct. 1198 (1982). The Court notes, however, that the interpretation of California Supreme Court Rules which gave rise to the exhaustion concern resulting in dismissal in C 81-2738 TEH is undermined, if not rejected, by the Ninth Circuit's opinion in Maxwell v. Sumner, 673 F.2d 1031, 1034 n. 1 (9th Cir. 1982), a case decided before Rose v. Lundy. See generally re exhaustion, Lynn and Bolz, Federal Habeas Corpus Review of State Criminal Cases, in Appeals and Writs in Criminal Cases, §§ 4.25-4.42 (California Continuing Education of the Bar 1982).

factual background established, we now turn to a discussion of the merits of Petitioner Spain's claims.

III. DISCUSSION

A. Communications between juror and judge.

1. Constitutional error.

Consistent with the Califoria Court of Appeal decision in this case, the Respondents here do not dispute that, as a result of the ex parte communications that took place during trial between Juror Fagan and Judge Broderick, Petitioner Spain was denied his federal constitutional rights to be present at a critical stage of his trial and to be represented by counsel. Absent a violation of the United States Constitution, it would be error for this Court to issue a writ of habeas corpus. Smith v. Phillips, ___ U.S. ___, 102 S. Ct. 940,

948 (1982). The Court of Appeal decision and the Respondents' concession notwithstanding, to the extent that finding a constitutional violation requires the application of legal standards to historical facts, the existence of such a violation must be independently determined by this Court. Sumner v. Mata, supra, 102 S. Ct. at 1306-07; Pierre v. Thompson, 666 F.2d 424, 427 (9th Cir. 1982); see also Cuyler v. Sullivan, 446 U.S. 335, 342 (1980). Furthermore, a determination of the fact and nature of the constitutional error here is necessary to a full understanding of the dispute between the parties concerning the standard of review to be applied in this case.

The California Court of Appeal, reviewing this aspect of the case, perceived the issue before it as

> aris[ing] at the confluence of three streams of constitutional doctrine, flowing from the right of defendants in criminal proceedings to trial by an impartial jury, their right to be personally present during the proceedings, and their right to be represented by an attorney.

Ct. App. Opinion at 12. Only the latter two aspects of constitutional doctrine are raised by Spain before this Court. We note, however, extending the California Court's metaphor, that the right to be tried by an impartial jury is an ever-present undercurrent in the right to be present and the right to counsel claims made here by the Petitioner.

Focusing first on the right of a criminal defendant to be physically present at a critical stage of the trial, we note at the outset that this right is not one enumerated in the United States Constitution. Nonetheless, the Supreme Court has recognized the constitutional

stature of rights essential to due process of law in a fair adversary proceeding, and has identified as one such right that of the accused in a criminal proceeding "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." Faretta v. California, 422 U.S. 806, 819 n.15 (1975). See also Badger v. Cardwell, 587 F.2d 968, 970 (9th Cir. 1978).

The constitutional right to be present thus extends to conferences between judge and juror, at least where the defendant's absence could, under some set of circumstances, be harmful. United States v. Walls, 577 F.2d 690, 697-98 (9th Cir.), cert. denied, 439 U.S. 893 (1978). The circumstances of this case leave no doubt that Petitioner Spain's absence during the conversations between Juror Fagan and Judge Broderick might

have frustrated the fairness of the trial and that the Petitioner's absence therefore violated his constitutional right.[5]

The right to jury trial in criminal cases, guaranteed in state proceedings by force of the Fourteenth Amendment, Duncan v. State of Louisiana, 391 U.S. 145 (1968), encompasses the right to trial by an impartial jury. U.S. Const. amend. VI, § 2 (emphasis supplied). Stressing this impartiality requirement at note 10 of its opinion in Turner v.

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5. As the definition of the right indicates, a finding that the right to be present has been violated does not necessarily mean that the proceedings were per se unfair. Rather, a determination that the constitutional right was violated means only that the defendant's absence occurred under circumstances that might give rise to a deprivation of fundamental fairness. As to the separate question of whether a violation of the right requires issuance of the writ sought here, see discussion of Standard of Review, this Opinion, infra, at pages 16, 21-33.

State of Louisiana, the Supreme Court observed that

> The requirement that a jury's verdict "must be based upon the evidence developed at trial" [Irvin v. Dowd, 366 U.S. 717, 722 (1961)] goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 10/ "The jury is an essential instrumentality--an appendage--of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law." Sinclair v. United States, 279 U.S. 749, 765 [(1929)] . . .

379 U.S. 466, 472 (1965) (emphasis supplied). The content as well as the fact of the conversations between Juror Fagan and Judge Broderick indicate that the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury, was in question during those discussions.

During her second conversation with the trial judge, Ms. Fagan let it be known

that she had somehow confirmed what, during their first conversation, she had only suspected--that the Pratt about whom testimony was being given had murdered her friend. Ms. Fagan thus conveyed to Judge Broderick that she had at her disposal information not introduced at trial, either as evidence or otherwise.[6]

Furthermore, that the information she possessed was extremely distrubing to Ms. Fagan is revealed not only by what Ms. Fagan told Judge Broderick about her emotional state, but also by

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6. Based on the post-trial hearing, the trial court found that Ms. Fagan's failure to reveal this information at the pre-trial voir dire was not willful. C.T. 24013:18-28. Petitioner Spain does not challenge that finding, and we presume it to be correct. 28 U.S.C. § 2254(d).

The Respondent's argument that the information in Ms. Fagan's possession did not relate to a fact in controversy at trial is discussed, infra, at pages 24-26 of this Opinion.

the fact that the conversations with him occurred at all. Juror Fagan told the judge, not once but twice, that continued discussion at trial of her friend's death might be so emotionally disturbing as to cause her to cry. The truth of Ms. Fagan's statements about her emotional condition is apparent from the fact that, in order to approach Judge Broderick, Ms. Fagan had to overcome an explicit admonition from the judge himself not to discuss the case with anyone. C.T. 23971:24-26. An issue so troubling that it provokes an apparently conscientious juror[7/] to breach a clear instruction from the court at least raises concerns about the person's ability to continue to

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7. At the time that these conversations with Judge Broderick occurred, Ms. Fagan had been sitting on the jury, evidently without incident, for over eight months. See Ct. App. Opinion at 13.

be an impartial juror, concerns reinforced by the obvious emotional impact that the testimony triggering the conversations with the judge had on the juror.

During each of the two discussions he had with Ms. Fagan, Judge Broderick inquired whether Ms. Fagan felt that she could dispose of the case fairly despite the information in her possession. This fact confirms that the content and nature of the conversations posed for the trial judge, as for this Court, questions about Ms. Fagan's fitness to continue to serve as a juror. When these ex parte communications occurred, questions thus arose as to whether the essential elements of trial by an impartial jury, as articulated by the Supreme Court in Turner v. State of Louisiana, supra, continued to be satisfied.

Petitioner Spain's absence from conversations implicating a juror's ability to judge impartially the case against him presented the same possibility for frustrating the fairness of the proceedings as would his absence from initial voir dire. See United States v. Crutcher, 405 F.2d 239, 242-43 (2nd Cir.), cert. denied, 394 U.S. 908 (1968). See also Fed. R. Crim. P. 43(a); United States v. Alessandrello, 637 F.2d 131, 138 (3rd Cir. 1980), cert. denied. 451 U.S. 949 (1981) (Fed. R. Crim. P. 43 encompasses constitutional rights re exclusion from pre-trial voir dire of jury). We are compelled to conclude, therefore, that the failure to provide for Spain's presence during the conversations between Judge Broderick and Juror Fagan deprived him of his constitutional right to be present at a critical stage of his trial.

We turn next to the Petitioner's claim that the ex parte communications between Ms. Fagan and the trial judge deprived him of his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution. Gideon v. Wainwright, 372 U.S. 335 (1963). Although the right to counsel is not absolute, it is fundamental to our system of justice in that it is meant to assure fairness in the adversary criminal process. United States v. Morrison, 449 U.S. 361, 364 (1981). Consistent with this purpose,

> the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.

Herring v. New York, 422 U.S. 853, 857 (1975).

Among the "traditions of the adversary fact-finding process" constitutionalized in the Sixth and Fourteenth Amendments is the right to be tried by an impartial jury. U.S. Const. amend. VI § 2, Duncan v. State of Louisiana, supra, 391 U.S. 145. Thus, paraphrasing the Supreme Court in Herring, there can be no restrictions on the function of counsel in defending a criminal prosecution in accord with the right to a trial by an impartial jury. That the right to be so tried was put in issue by the conversations between Juror Fagan and Judge Broderick is clear from the foregoing discussion of Petitioner Spain's right to be present during those conversations. The absence of Spain's counsel from those same conversations prevented the attorney from protecting the fundamental integrity

of his client's trial by jury and thus violated Spain's Sixth Amendment right to counsel.

In circumstances such as those presented here, the lawyer's function in protecting a client's right to trial by an impartial jury has several facets. When there are mid-trial indications that a juror may be unfit to continue to serve on the jury, defense counsel's first objective would be to determine, by either direct or indirect participation in voir dire of that juror, whether the person in fact remains qualified to sit on the jury. If, as a result of that voir dire, the juror is found to be biased or otherwise unfit to serve, counsel would seek to have that juror removed and replaced by an alternate if possible. Even if the juror were found fit to continue to serve, however, a competent lawyer would have

the remaining objective of preventing the voir dire of the juror thereby "contaminated" from coming to the attention of other jurors in a way that might be prejudicial to the defendant. Counsel would thus seek to have the court instruct the voir dired juror so as to severely limit if not eliminate conversations with other jurors about the nature and conetnt of the mid-trial voir dire, thereby minimizing the possibility that other jurors would be tained by either the fact or the substance of that voir dire.

In this case' because the trial judge never informed the parties of his conversations with Ms. Fagan, Spain's lawyer never had the opportunity to accomplish these goals.[8/]

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8. Thus, though the right to counsel protected by the Sixth Amendment is subject to waiver, Johnson v. Zerbst, 304 U.S. 458 (1938), no suggestion has been

(Footnote continued on next page.)

In light of the nature of the information revealed to Judge Broderick by Ms. Fagan, the words of Mr. Justice Sutherland in Powell v. Alabama seem particularly germane to this case.

Footnote 8 continued:

or could be made that the right was waived in this case. It is appropriate to note in this context that Supreme Court cases

> have consistently recognized the important role the trial judge plays in the federal system of criminal justice. "The judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . ."

Geders v. United States, 425 U.S. 80, 86 (1976). Though the cases establishing this principle generally involve federal court trials, the role of the state court judge in assuring the proper conduct of the trial by protecting the defendant's federal constitutional rights is no less important. Fulfillment of this role is essential to minimize federal intrusion into state criminal proceedings. See Engle v. Isaac, ___ U.S. ___, 102 S. Ct. 1558, 1571-72 (1982). We note also the

(Footnote continued on next page.)

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . He requires the guiding hand of counsel at every step of the proceedings against him.

287 U.S. 45, 68-69 (1932) (emphasis supplied).

2. Standard of review.

Constitutional error having thus resulted from the ex parte communications

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Footnote 8 continued:

Supreme Court's observation, in a case involving collateral attack on a state criminal conviction, that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, supra, 102 S. Ct. at 946.

between Ms. Fagan and Judge Broderick, we now must scrutinize the effect of that error on Petitioner Spain's conviction and thus the appropriateness of habeas corpus relief under the circumstances presented here. Such an examination involves the two-step process of determining the standard of review applicable to the constitutional violation at issue and of applying that standard to the facts before us.

As the foregoing discussion makes clear, the right to presence and the right to counsel violations that occurred are closely related. The interests protected by Spain's presence would have been protected and furthered had Spain's counsel alone participated in a mid-trial voir dire of Ms. Fagan. See Powell v. Alabama, supra, 287 U.S. at 68-69, and this Opinion, supra, at page 15. This congruence of the rights

at issue permits us to focus on the standard of review governing the right to counsel violation that occurred here. An examination of the standard of review applicable to the right to presence violation would add nothing to the analysis.[9/]

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9. Violation of the right to presence creates a presumption of prejudice. United States v. Taylor, 562 F.2d 1345, 1365 (2d Cir.), cert. denied, 432 U.S. 909 (1977). Petitioner Spain suggests that this presumption compels automatic reversal of any conviction obtained under circumstances where the right was violated. Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, 17:12-17. Spain fails to note, however, that the cases cited in support of this contention--Lewis v. United States, 146 U.S. 370 (1892) and Hopt v. People, 110 U.S. 574 (1884)--involved the absence of the defendant from the initial jury selection process. Where, as here, the right to be present was violated by a mid-trial communication between judge and juror, the test applied is not automatic reversal, but harmless error. United States v. Taylor, supra, 562 F.2d at 1365; see also United States v. Walls, supra, 577 F.2d at 698.

For a discussion of the application of the harmless error test to the facts of this case, see this Opinion, infra, at pages 21-33.

The State takes the position that the California Court of Appeal was correct in applying the harmless error test to the violation of Spain's right to counsel. Spain argues that the nature of the violation here requires automatic reversal of his conviction. The principles that govern resolution of this dispute between the parties are enunciated and analyzed in depth by the Ninth Circuit sitting en banc in Cooper v. Fitzharris, 586 F.2d 1325, 1331-33 (9th Cir. 1978), ert. denied, 440 U.S. 974 (1979), and were recently summarized in Slappy v. Morris, 649 F.2d 718, 722-23 (9th Cir. 1981), cert. granted, ___ U.S. ___, 102 S. Ct. 1748 (1982). Proper application of those principles to the right to counsel deprivation that occurred in this case dictates the automatic reversal of Spain's

conviction.[10]

As described by the Ninth Circuit in Cooper, right to counsel cases are separable into two groups: one group in which the harmless error test applies, and a second group in which violation of the right results in automatic reversal of the conviction. By examining the circumstances surrounding the right to counsel violation in each of these groups, the Court of Appeals identified the factors that are critical to determining into which group a given case falls.

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10. Unlike state court factual determinations, state court findings of law are not entitled to deference in a federal court considering a petition for writ of habeas corpus. Sumner v. Mata, supra, 102 S. Ct. at 1306-07; Townsend v. Sain, 372 U.S. 293, 318 (1963). Thus the decision by the California Court of Appeal that the harmless error test applied to the right to counsel violation here in no way binds this Court, which is obligated to apply the controlling federal law to the facts before it.

In the group of cases to which the harmless error test applies, the constitutional error occurs under circumstances that permit a reviewing court to determine from the record whether deprivation of the right to counsel was harmless beyond a reasonable doubt. This group of cases thus involves those where

> "the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." [Holloway v. Arkansas, 435 U.S. at 475] at 490, 98 S.Ct. [1173] at 1182 [(1978)].

Cooper v. Fitzharris, supra, 586 F.2d at 1332.

By contrast, in cases requiring automatic reversal, the trial court record is such that a reviewing court seeking to discern the harmlessness of

the right to counsel violation would be forced to engage in "unguided speculation." Id.

> When no counsel is provided or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made.

Id.; accord, Slappy v. Morris, supra, 649 F.2d at 723. Under such circumstances, the harmless error standard, which is predicated on review of a record that reflects that the defendant was prejudiced in some specific fashion, is not "susceptible to intelligent, evenhanded application." Cooper v. Fitzharris, supra, 586 F.2d at 1332, quoting Holloway v. Arkansas, 435 U.S. at 490. A reviewing court confronted with a deprivation of the constitutional right to counsel must reverse where the state of the record precludes intelligent, evenhanded application of the standard of review

that would otherwise control.[11]

A comparison of the facts in Cooper v. Fitzharris, supra, and Slappy v. Morris, supra,[12] is instructive for

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11. A federal district court reviewing a state conviction in the context of a petition for writ of habeas corpus is authorized to expand the trial court record if necessary to determine the appropriateness of issuance of the writ. Harris v. Nelson, 394 U.S. 286 (1969); Rule 7, Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254. As discussed, infra, at pages 26-30[,] of this Opinion, however, this Court's ability to expand the state court record is severely limited by the factual circumstances of the case before it.

12. As noted above, the Supreme Court has granted certiorari in Slappy v. Morris, ___ U.S. ___, 102 S. Ct. 1748 (1982). The nature of the constitutional violation at issue in Slappy is markedly different from the violation at issue here. Slappy concerns the circumstances under which failure of appointed counsel to appear at trial will be treated as a deprivation of the constitutional right to counsel even though the defendant was represented by substitute counsel. With respect to the ex parte communications between the judge and juror in Petitioner Spain's case, no counsel appeared, either substitute or otherwise. Thus the Slappy case is used

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comprehending the distinction between these two groups of cases and for assessing the instant case in terms of that distinction.

In Cooper, the petitioner alleged ineffective assistance of counsel resulting from errors and omissions committed by his attorney at trial. Alleged as the trial lawyer's defaults were the failure to object to the admission into evidence of fruits of a warrantless search, the failure to move to suppress statements made by the petitioner to the police, the failure to object to testimony concerning the identification of the petitioner at a pre-indictment lineup, and the failure to inform the petitioner

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Footnote 12 continued:

here only to illustrate the principles dictating automatic reversal of a conviction and is not relied upon to establish the existence of a constitutional violation.

of his right to appeal. 586 F.2d at 1328. Distinguishing Cooper's case from those in which reversale was automatic once deprivation of the right to counsel was shown, the Ninth Circuit observed that

> [i]n this case, appellant does not assert that he was denied counsel at trial, or that counsel, though present, was prevented from performing a critical function or otherwise impeded in the advocacy of appellant's cause. Rather, appellant contends that although he had an attorney present and acting freely on his behalf, he did not have effective assistance of counsel because his attorney erred in specific respects in the course of trial. . . . [T]hese omissions were not forced on defense counsel. Their impact appears on the face of the trial record. Their prejudicial effect can be evaluated from that record with reasonable certainty. In such a case there is no reason to reverse a conviction if it appears that the defense was not prejudiced by the alleged inadequacies of counsel's performance.

Id. at 1332. By applying these principles, the court was able to ascertain with "reasonable certainty" that the specific errors allegedly committed by trial counsel either were not errors under the state of the law as it existed at the time of trial or were not prejudicial. See id. at 1333-34.

In Slappy, the Ninth Circuit found that the petitioner was denied his right to counsel when the tiral judge, without making any inquiry as to when the public defender originally appointed to represent the defendant might be available, refused to grant a continuance of the trial to enable that lawyer to be present. 649 F.2d at 721-22. By arbitrarily depriving the petitioner of his right to a "meaningful attorney-client relationship," the trial court infringed on Slappy's Sixth Amendment right to counsel. Given the nature of the

constitutional violation, the competency of the public defender appointed as substitute counsel was irrelevant. Id. at 723. The injury inflicted on Slappy arose from interference with his relationship with his first lawyer, and because the impact of that harm on the defense could not be assessed by examining the trial record established by a second lawyer, automatic reversal was required.

When the facts of Petitioner Spain's right to counsel violation are viewed in light of the distinction thus drawn between cases scrutinized under the harmless error test and those subject to automatic reversal, it is clear that reversal is automatic here. The state of the record, viewed in light of the nature of the violation, precludes intelligent application of the harmless error standard. Counsel for Spain was

barred from discharging the critical function of protecting Spain's right to trial by an impartial jury when the trial judge failed to inform him of the ex parte communications from Juror Fagan. See Cooper v. Fitzharris, supra, 586 F.2d at 1332. Spain's counsel was not only prohibited from determining Ms. Fagan's continuing fitness to serve on the jury, but also was prevented from making efforts to minimize the impact on other jurors of Ms. Fagan's information and emotional state. See Gibson v. Clanon, 633 F.2d 851, 854 (9th Cir. 1980), cert. denied, 450 U.S. 1035 (1981); see also Section III., A., 1. of this Opinion, supra. No record was made of the conversations between judge and juror at the time they occurred, and the private nature of those discussions prevented the resultant interference with the normal functions of Spain's lawyer from being

"readily apparent on the record." Cooper v. Fitzharris, supra, 586 F.2d at 1332; Slappy v. Morris, supra, 649 F.2d at 723. Reversal of Spain's conviction is thus compelled because there is no record that permits this Court to undertake with confidence an assessment of the "likelihood that the error materially affected the deliberations of the jury." Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

What is known from the record of the trial is that Ms. Fagan had at her disposal information, not introduced as evidence, connecting a leader of the Black Panther Party to the violent death of her friend, that the murder of her friend was an extemely emotional issue for Ms. Fagan; and that other jurors were told by Juror Fagan of the murder of her friend by a Black Panther Party leader. The inability of Spain's lawyer

to establish a record with respect both to Ms. Fagan's possible bias and to efforts to limit the contamination of other jurors prevents this Court from engaging in anything but "unguided speculation" as to the impact of these matters on the jury's deliberations. Cooper v. Fitzharris, supra, 586 F.2d at 1332. The violation of Spain's right to counsel under these circumstances therefore compels reversal of the conviction and issuance of the writ without further inquiry into the harmlessness vel non of the constitutional error.[13/]

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13. Respondents cite two cases in which the absence of counsel during judge-jury communications was tested under the harmless error standard, United States v. Cassasa, 588 F.2d 282, 285 (9th Cir. 1978), cert. denied, 441 U.S. 909 (1979) and United States v. Reynolds, 489 F.2d 4, 7-8 (6th Cir. 1973), cert. denied, 416 U.S. 988 (1974), on which the Cassasa court relied. Both of these cases involved communications between the judge and jury during final

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The Respondents point to the post-trial hearing on Spain's motion for a new trial, contending that the record

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Footnote 13 continued:

jury deliberations rather than in the midst of trial, and both are distinguishable from this case for two further reasons. First and most important is that in both cases a record existed of all of the communications and the circumstances under which they occurred. This is in stark contrast to the instant case in which, though the record may permit us to reconstruct the content and context of Ms. Fagan's conversations with Judge Broderick, there is nothing from which to discern exactly what other jurors were told and the circumstances under which they obtained information from Ms. Fagan. Thus, unlike Cassasa and Reynolds, the record here does not enable this Court to determine whether the constitutional error was harmless. Second, neither case posed a question of a violation of the defendant's constitutional right to counsel. Both cases were decided under Fed. R. Crim. P. 43(a), a Rule not implicated here because Petitioner Spain was tried in state, not federal, court. With respect to this distinction, we note that Rule 43(a), violation of which triggers the harmless error standard adopted in Fed. R. Crim. P. 52(a), concerns the absence of a defendant at every trial stage, and makes no reference to the right of a federal criminal defendant to have counsel present.

adduced there concerning the ex parte communications between judge and juror permits this Court to make the assessment required under the harmless error test and thus obviates the need to automatically reverse Spain's conviction. The defect in this contention is apparent from the fact that reversal would be required even if the harmless error standard, rather than automatic reversal, were applicable to the right to counsel violation in this case. We therefore turn to application of the harmless error test to demonstrate the weakness of Respondents' contention, thereby also illustrating the analysis by which this case would be decided if the deprivation of Spain's right to be present were the only constitutional error at issue here. See Section III., A., 2. of this Opinion, supra, at 16, n. 9.

As a threshold matter, we note that the California trial court, in denying Petitioner Spain's motion for a new trial, implicitly if not explicitly found the constitutional errors at issue here to be harmless. C.T. 24013:12-24014:7. The California Court of Appeal expressly reached the same conclusion. Ct. App. Opinion at 14-17. As pointed out above, a state court's findings of fact are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. § 2554(d); see Hines v. Enomoto, 658 F.2d 667, 675 (9th Cir. 1981). A state court's application of the legal standard to those facts, however, is not entitled to deference. See Sumner v. Mata, supra, 102 S.Ct. at 1306-07; see also Imbler v. State of California, 424 F.2d 631, 632 (9th Cir.) (per curiam), cert. denied, 400 U.S.

865 (1970). Application of the constitutional harmless error test to the facts thus presents a federal question that this Court must resolve independently. Chapman v. State of California, 386 U.S. 18, 20-21 (1967).

Our task under the harmless error test is to determfne whether there is a reasonable possibility that the error materially affected the verdict. Hinman v. McCarthy, 676 F.2d 343, 349-5- (9th Cir. 1982). If so, a reversal of the conviction is mandated. Id. Alternatively stated, a writ must issue unless the Respondents prove beyond a reasonable doubt that the constitutional error that occurred here did not contribute to the verdict obtained. Chapman v. State of California, supra, 386 U.S. at 24.

Rather than focus on the right to be present or the right to counsel violations in arguing that what occurred

at Spain's trial was harmless beyond a reasonable doubt, the Respondents stress the right to be tried by an impartial jury that underlies each of these violations. This focus is reflected in the two basic premises of the Respondents' harmless error argument: that the matters communicated during Ms. Fagan's conversations with the trial judge did not relate to a fact in controversy at the trial, and that any inference of juror bias that could be drawn from the fact of the ex parte communications was rebutted at the post-trial hearing.

With respect to the content of the conversations between Judge Broderick and Juror Fagan, the Respondents emphasize what they perceive as the reasons that ex parte communications between judge and juror are prohibited. As Respondents see it, the prohibition is a function of the danger that a juror may

receive incorrect information about the facts or law of the case, or that a juror may be influenced by the court's attitude as conveyed through such communications. Because the conversations between Ms. Fagan and Judge Broderick did not present either of these dangers, the Respondents argue that petitioner Spain was not prejudicedbby them. Not only was the subject matter of the discussions -- the death of someone at the hands of an individual who was neither a party nor a witness at Spain's trial -- unrelated to any fact in controversy, but the trial court did not communicate facts or legal principles to Ms. Fagan, nor attempt in any way to influence her. Thus, in Respondents' view, the content of the conversations did not harm the Petitioner because none of the dangers sought to be prevented by the prohibition of ex parte judge-juror communications was present.

Respondents nonetheless acknowledge that the defense may have been harmed by the fact that, at the time of the conversations, Spain's lawyer was unable to determine whether Ms. Fagan was biased by the information about her friend's death. At the hearing on Spain's motion for a new trial, however, Ms. Fagan testified that she was not biased against Petitioner Spain, and, on the basis of her testimony, the trial court as well as the California Court of Appeal found Ms. Fagan to have been a fair and impartial juror. The Respondents point to the record of the post-trial hearing as enabling this Court to make the requisite determination under the harmless error standard and as showing that, in fact, the error that occurred was harmless beyond a reasonable doubt. As to the other jurors, Respondents contend first that,

as with the conversations between Ms. Fagan and the judge, the content of the information conveyed to them by Ms. Fagan was completely unrelated to matters that the jury was called upon to decide, and thus there is no reason to doubt their impartiality. Furthermore, Respondents argue that Petitioner Spain's failure to call the other jurors to testify at the post-trial hearing constitutes a waiver of any challenge to the conviction based on juror contamination.

By focusing on the juror partiality implications of Ms. Fagan's conversations with the trial judge, Respondents ignore significant interests sought to be protected by the right to presence and the right to counsel, interests that cannot be adequately safeguarded by a post-trial hearing. The weaknesses in the Respondents' argument are examined below.

Respondents contend that because Judge Broderick neither communicated information to Ms. Fagan nor attempted to influence her, Petitioner Spain could not have been harmed by the substance of what was said during the ex parte conversations. By concentrating on what was said to Ms. Fagan, the Respondents overlook that Juror Fagan was telling the trial judge that she had information that was not introduced as evidence at trial. This fact apparently escaped the attention of the trial judge, but nothing in the trial record permits us to determine whether it would also have gone unnoticed by Petitioner Spain and/or his lawyer if they either had been present at, or notified of the occurrence and content of, the conversations between Ms. Fagan and Judge Broderick. Spain was thus deprived of the opportunity to explore what Ms. Fagan knew,

how she came to know it, the effect of her knowledge on her state of mind with respect to affording the Petitioner a fair hearing, and ways of preventing the information from coming to the attention of other jurors.

Possibly recognizing this weakness in their argument, the Respondents stress that Petitioner Spain could not have been harmed by what was revealed during the conversations between the juror and the judge because the subject matter under discussion was unrelated to anything in controversy at trial. Though it is true that Carolyn Olson's death and Elmer Pratt's role in it were not directly at issue in Petitioner Spain's trial, it does not follow, as Respondents contend, that the subject under discussion between Ms. Fagan and Judge Broderick was "totally irrelevant" to the trial.

Respondents' Memorandum of Points and Authorities, 21:5-8. Respondents take far too narrow a view of the trial.

As the pre-trial jury voir dire reveals, Spain's counsel was concerned from the outset that those who sat in judgment on his client not have personal experience with violence or associate the Black Panther Party with violence. The trial court acknowledged the validity of this concern when it permitted pre-trial voir dire on these subjects. See this Opinion, supra, at page 3. Its legitimacy is reflected in the violent nature of the crimes charged, the defense testimony about Spain's Black Panther Party membership, and the prosecution's suggestion in closing argument that Spain's criminal liability should be inferred from his association with the Black Panther Party. When Ms. Fagan talked to the judge about Carolyn

Olson's death, she revealed that, her voir dire testimony notwithstanding, compare Smith v. Phillips, supra, 102 S.Ct. at 943-44 n. 4, she had personal knowledge of violent crime. Carolyn Olson was a good friend who had been brutally murdered. That Ms. Fagan had personal experience with violent crime, however, was not the only information that came to light during the juror's conversations with the trial judge. Petitioner Spain and his defense counsel might well have been even more concerned, had they known, that Ms. Fagan believed that her good friend had been killed by a leader of the Black Panther Party.

Respondents discount this information about the identity and political affiliation of Carolyn Olson's killer with the observation that Pratt was neither a witness nor a party at trial. This statement, though true, misses the

point. From Petitioner Spain's perspective, the combination of Ms. Fagan's knowledge, its emotional impact on her, and the trial testimony concerning Elmer Pratt's leadership role in the Black Panther Party had potentially devastating implications. In a case concerning a violent series of events in which the Black Panther Party played a key role, see Ct. App. Opinion at 3-6, the defendant, though he did not know it, was being judged by a juror greatly distressed by memories of the violent death of her good friend at the hands of a person she knew to be a Black Panther Party member -- a person shown by trial testimony to be a leader of that party. Extraordinary insight is not required to perceive the potential harm to Petitioner Spain if Ms. Fagan's personal experience, rather than the evidence at trial, were permitted to determine

jurors' assessments of the defendant's guilt or innocence. If Spain or his lawyer had been made aware of the content of the communications between Juror Fagan and the trial judge, they would have had an opportunity to explore and attempt to limit this potential harm.

Apparently conceding that Ms. Fagan's revelations posed some danger to Petitioner Spain, Respondents acknowledge that the better course of action would have been to conduct a mid-trial voir dire of Ms. Fagan to explore the potential for bias reflected by her conversations with Judge Broderick. Respondents' Memorandum of Points and Authorities, 16:29-17:2. According to the Respondents, however, failure to follow the concededly preferable course was harmless because Ms. Fagan testified post-trial that she was not biased by the

information she possessed or its effect upon her.

Respondents correctly observe that a juror is permitted to testify at a post-trial hearing convened to determine whether juror partiality played an impermissible role in the outcome of a trial. See Smith v. Phillips, supra, 102 S.Ct. at 944-46, and People v. Hall, 1108 Cal.App.3d 373, 380, 176 Cal.Rptr. 729, 732 (1981). At the same time, the Respondents necessarily concede that a juror may not testify post-trial about the mental process by which she arrived at a verdict. Mattox v. United States, 146 U.S. 140, 149 (1892); Fed. R. Evid. 606(b); People v. Hall, supra, 108 Cal.App.3d at 378-80; Cal. Evid. Code § 1150(a). When Ms. Fagan's post-trial testimony is examined in light of this rule restricting juror impeachment of a verdict, it is clear that, even relying

on the post-trial record, the Respondents cannot prove beyond a reasonable doubt that the constitutional errors that occurred in this case did not contribute to the verdict.

The rule, broadly stated, that a juror is incompetent to testify to impeach his/her verdict, McCormick's Handbook on the Law of Evidence 148 (2d ed. E. Cleary 1972), developed to protect the finality of the verdict and the sanctity of the deliberative process resulting in that verdict. See Mattox v. United States, supra, 146 U.S. at 148. A distinction reflecting a balance of these concerns and the interests of justice has been drawn between what may and what may not be established by juror testimony in connection with challenges to verdicts. That distinction, articulated in

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Mattox,[14] is embodied in modern evidentiary rules. Rule 606(b) of the Federal Rules of Evidence provides that

> Upon inquiry into the validity of a verdict . . . , a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon his or any other

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14. The Supreme Court in Mattox drew the distinction between admissible and inadmissible juror testimony as follows:

> [T]he evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.

Id. at 149. Compare Fed. R. Evid. 606(b); see also Cal. Evid. Code § 1150(a).

> juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith, except that a juror may testify on the question whether prejudicial information was improperly brought to the jury's attention or whether outside influence was improperly brought to bear upon any juror.

See United States v. Moten, 582 F.2d 654, 664-65 (2d Cir. 1978). California Evidence Code Section 1150(a) similarly distinguishes between independently ascertainable events and the deliberative process of the jury in determining the admissibility of evidence offered to test

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the validity of a verdict.[15]

The fact and content of Ms. Fagan's conversations with Judge Broderick clearly fall into the category of matters to which a juror may testify during hearings challenging a verdict. Though the trial court and the California Court of Appeal stressed that the information Ms. Fagan possessed was at best only

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15. California Evidence Code §1150(a) states:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental process by which it was determined.

See People v. Hall, supra, 108 Cal.App. 3d at 378-380.

marginally relevant to the trial, see C.T. 24013:12-17, 24014:1-7; Ct. App. Opinion at 13-14 and 18-19, the potential prejudice to Petitioner Spain did not arise from Elmer Pratt's connection to the 1971 events at San Quentin but from Ms. Fagan's knowledge of and reaction to matters not in evidence at trial. See discussion, supra, at pages 25-26 of this Opinion. The danger that the verdict might have been improperly influenced by what Ms. Fagan knew, how it affected her, and what the other jurors knew about the death of Ms. Fagan's friend certainly brings these matters within the scope of those that may be the subject of post-trial juror testimony in either California state or federal court.

In neither state nor federal court, however, could Ms. Fagan or any other juror testify about how or whether the circumstances of Carolyn Olson's death

influenced the decision to assent to the verdict. Cal. Evid. Code § 1150(a); Fed. R. Evid. 606(b). See also Ct. App. Opinion at 17 (some of Ms. Fagan's testimony at the motion for a new trial insofar as it relates to her mental attitude in arriving at the verdicts may well have been inadmissible). Once it is determined that prejudicial information was improperly brought to the jury's attention, the reviewing court must decide whether the impropriety was harmless in its effects on the jury's deliberations. That decision must be made without reference to testimony from jurors about what influenced their verdict.

The Respondents' observation that a juror may testify at a post-trial hearing concerning juror partiality is accurate but inapposite. Matters within a juror's personal experience that

relate to issues generally raised by all criminal trials are far different from specific information implicating the merits of a particular case but not introduced in evidence. Thus, that a juror may testify at a post-trial hearing at which a court seeks to determine whether juror partiality played an impermissible role in the outcome of a trial, Smith v. Phillips, supra, 102 S.Ct. at 944046, does not mean that a juror may testify as to whether prejudicial information concerning the merits of a case and improperly brought to the attention of the jury influenced the outcome of the jury's deliberations.[16/]

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16. Smith v. Phillips, supra, 102 S. Ct. 940 (1982) provides a useful contrast to the instant case. In Smith, a criminal defendant contended that he had been denied Due Process because, during his state court trial, one of the jurors in his case applied to the prosecutor's office for a job as an investigator. Though the juror's

(Footnote continued on next page.)

This limitation on matters to which a juror may testify post-trial completely undermines the Respondents' contention that Petitioner Spain waived

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Footnote 16 continued:

interest in a federal law enforcement career was revealed and thoroughly examined by defense counsel during initial voir dire, id. at 943-44 n. 4, the fact of the application was not brought to the trial court's attention until sometime after the verdict was rendered. The trial court held a post-trial hearing on a motion to set aside the verdict at which the errant juror testified. The trial judge denied the motion to set aside the verdict, finding that the juror's action did not reflect an inability to consider the guilt or innocence of the defendant solely on the evidence. The federal district court issued a writ of habeas corpus, imputing juror bias from the circumstances, though unable to find sufficient evidence of actual bias on the juror's part.

Rejecting the use of implied juror bias as grounds for requiring a new trial, the Supreme Court reversed. The Court observed that neither the federal district nor the federal circuit court took issue with the trial court's findings, and stated that

(Footnote 16 continued on next page.)

any challenge he might have had based on juror contamination by failing to call

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Footnote 16 continued:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen . . . [A] hearing such as that conducted [by the trial court] here is sufficient to decide allegations of juror partiality. . .

102 S. Ct. at 946.

The contrast to Petitioner Spain's case is striking. As pointed out in the text, the matter to be resolved at the post-trial hearing was quite different in Smith from that in the instant case. The only issue in Smith was that of juror partiality based on juror conduct unrelated to the merits of the case against the defendant. Furthermore, the sequence of events in Smith gave rise to a very different constitutional claim from those involved here. In Smith, as soon as the information about possible juror bias came to light, a hearing was conducted with the defendant and his counsel present and participating. The only issue at that hearing was juror partiality and its Due Process implications, and the

(Footnote continued on next page.)

any challenge he might have had based on juror contamination by failing to call other jurors to testify at the post-trial hearing. It is clear from the record of the post-trial hearing that Ms. Fagan communicated the fact of her friend's death at the hands of Elmer Pratt to other jurors. P.App. 5482:2-3; C.T. 23971:28-23972:1. These other

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Footnote 16 continued:

nature of the initial voir dire concerning the juror's interest in a law enforcement career made the juror's post-trial testimony virtually cumulative. There was thus no ex parte communication in Smith on which a claim of deprivation of the right to presence or the right to counsel could be based, and no revelation of significant information concerning the merits of the case that was not disclosed at the initial voir dire. The harmlessness of the juror's conduct in Smith could be determined post-trial, and no harm independent of that conduct was alleged. In the case before this Court, the failure to the trial judge to conduct a mid-trial voir dire of Ms. Fagan gave rise to constitutional violations not subject to cure by a post-trial hearing.

jurors, if called, could not have testified whether or to what extent this information influenced their respective decisions to assent to the merdicts. Cal. Evid. Code § 1150(a); Fed. R. Evid. 606(b). Petitioner Spain raised the question of juror contamination both at the trial court and the state appellate court levels. C.T. 23985:11-15; Ct. App. Opinion at 11. In light of the restrictions on juror post-trial testimony, Petitioner Spain could have done nothing more to preserve his claim of juror contamination.

To the extent that the constitutional errors that occurred here implicate the Due Process right to be tried by a panel of twelve impartial jurors, this Court's consideration of that issue thus is limited by the restrictions imposed on juror testimony about the deliberative process. These restrictions require the

application of an objective test to evaluate the effect that the prejudicial information brought to the jury's attention by Ms. Fagan had on the outcome of the trial. See United States v. Armstrong, 654 F.2d 1328, 1333 n. 2 (9th Cir. 1981) and Miller v. United States, 403 F.2d 77, 83-84 n. 11.[17] Under the objective test, this Court must assess for itself the likelihood that the information known and conveyed by Ms. Fagan would affect a typical juror. Id.

Were this a case involving a straightforward Due process claim, determination of the harmlessness vel non of the error would be dictated by

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17. Though these cases involved federal court trials at which jury contamination occurred, the objective test therein applied derives from the Federal Rules of Evidence which are also controlling in federal habeas corpus cases. See Smith v. Cupp, 457 F.2d 1098, 1100 (9th Cir.), cert. denied, 409 U.S. 880 (1972); see also Fed. R. Evid. 1101(a) and (e).

"the nature of what [was] infiltrated and the probability of prejudice." United States v. Love, 535 F.2d 1152, 1156 (9th Cir.), cert. denied, 429 U.S. 847 (1976). The nature of the information infiltrated and the possibility of prejudice that it posed have already been discussed at length and need not be reiterated. Considered alone they would be sufficient to raise a reasonable possibility that the error materially affected the verdict and thus to compel issuance of the writ sought here. Hinman v. McCarthy, supra, 676 F.2d at 349-50. Though the California Court of Appeal concluded that the fact that Petitioner Spain was acquitted on some counts shows that the jury was not biased, Ct. App. Opinion at 17-18, that very fact is subject to precisely the opposite inference. Spain was the only defendant who was a member of the Black Panther Party and the only

defendant convicted of conspiracy and murder. The only counts on which Spain was convicted were those with which he was connected, not by any direct participation in the acts of violence at San Quentin, but by his association and alleged conspiracy with George Jackson, also a Black Panther. All of the other defendants were acquitted of the conspiracy counts and the related substantive crimes. This pattern of convictions and acquittals, viewed from the perspective of the dangers posed by Ms. Fagan's personal exposure and reaction to events linking the Black Panther Party to other violent crime, certainly raises a reasonable possibility that the information known by Ms. Fagan and communicated to other jurors influenced the verdicts.

This case, however, goes far beyond a straight-forward Due Process claim

based on extra-judicial influences on the jury. The nature and circumstances of these right to presence and right to counsel violations prevent this Court from concluding beyond a reasonable doubt that neither of the errors influenced the verdict rendered against Petitioner Spain. Chapman v. State of California, supra, 386 U.S. at 24.

The Respondents contend that their burden under the harmless error test is met by the facts adduced at the post-trial hearing conducted in this case. Even putting aside the limitations on post-trial juror testimony already discussed, supra, at pages 26-29 of this Opinion, the function that was served by Spain and his counsel at the hearing on the motion for a new trial was far different from the one they would have performed at a mid-trial voir dire of Ms. Fagan. At the time the conversations

occurred, Judge Broderick perceived no connection between what Ms. Fagan told him and the issues in the case being tried. C.T. 23920:11-17; Ct. App. Opinion at 11. Accordingly, the trial judge's questions to Ms. Fagan went no further than to inquire of the juror whether the testimony about her friend would affect her disposition toward the case. If Petitioner Spain and his counsel had been informed of the fact and general content of the communications between Ms. Fagan and the trial judge, they would have been able to question her in depth about the relationship between her personal experience and her attitude about the case on which she was sitting. It is not unreasonable to assume that such questions, posed at a time when the emotional state prompting Ms. Fagan's contacts with the judge was still evident, might have elicited from

Ms. Fagan different responses from those given at the post-trial hearing.

Even if a mid-trial conference with Spain and his counsel participating had not resulted in removal of Ms. Fagan from the jury, the defense team would have had an opportunity to reassess the evidence they wished to present in light of what they learned about Ms. Fagan's exposure to the Black Panther Party. This opportunity, once lost, could not be regained by a post-trial hearing. Similarly, the chance to keep Ms. Fagan's information from reaching other jurors was a fleeting one not susceptible to recapture after the trial.

These irretrievable opportunities, if exercised by the Petitioner, certainly had the potential to influence the outcome of the trial. If mid-trial voir dire by Spain and his counsel had uncovered bias requiring replacement of

Ms. Fagan by an alternate juror untainted by personal exposure to Black Panther Party violence, it cannot be concluded beyond a reasonable doubt that the outcome of the trial with respect to Petitioner Spain would have been the same as it was with Juror Fagan sitting on the jury. If, despite a mid-trial voir dire, Ms. Fagan had remained on the jury, but, based on what was learned of Ms. Fagan's reaction to the death of her friend, the Petitioner and his counsel had decided not to introduce evidence stressing Spain's membership in the Black Panther Party, it cannot be said with confidence that the pattern of verdicts and acquittals would have been the same. It also cannot be concluded that the verdicts on the charges against Petitioner Spain would have been the same had other jurors not been informed that a Black Panther member had killed

a good friend of one of their fellow jurors, a fellow juror with whom they were in almost constant contact for over a year. Thus, the post-trial record notwithstanding, a reasonable possibility certainly exists that the failure to provide for the presence of Spain, or at least his counsel, at a mid-trial voir dire of Ms. Fagan affected the outcome of the case against the Petitioner.

As the foregoing alanysis reveals, the very circumstances that require automatice reversal in this case, see this Opinion, supra, at pages 19-21[,] would require reversal if harmless error were the applicable standard of review. The violation of Petitioner Spain's right to be present and right to counsel leave this Court with no choice but to issue the writ of habeas corpus sought by the Petitioner.

B. Shackling of Petitioner Spain.

Because the violation of Petitioner Spain's Sixth Amendment right compels issuance of the writ, we need not reach the constitutional issue raised by Spain's shackling claim. See New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979). Nor are we required to decide whether that claim, standing alone, mandates issuance of the writ. We observe, however, that the shackling of Petitioner Spain in the extreme manner used in the trial court appears to violate the right to a fair trial that is a fundamental liberty secured by the Fourteenth Amendment. Drope v. Missouri, 420 U.S. 162, 172 (1975).

Shackling a defendant in the courtroom is widely recognized as prejudicial because it infringes on the accused's right to the presumption of

innocence. Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973), cert. denied, 416 U.S. 959 (1974); United States v. Samuel, 431 F.2d 610, 614-15 (4th Cir. 1970), cert. denied, 401 U.S. 946 (1971); Loux v. United States, 389 F.2d 911, 919 (9th Cir.), cert. denied, 393 U.S. 869 (1968).[18/] See also Illinois v. Allen, 397 U.S. 337, 344 (1970). The presumption of innocence, though not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Estelle v. Williams, 425 U.S. 501, 503 (1976).

The right to the presumption of innocence at trial is not, however, an

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18. Though several of these cases were decided under the supervisory power of the federal appellate courts in federal criminal cases, the principles relied upon are equally applicable in the constitutional context presented here.

absolute right. Under certain circumstances, it must give way to the court's concern for the safety of other courtroom participants, United States v. Samuel, supra, 431 F.2d at 615, or to the need for an orderly trial, see Kennedy v. Cardwell, supra, 487 F.2d at 107. The question is whether, under the circumstances of the instant case, the physical restraints placed on Petitioner Spain were justified.

From the moment of his indictment, every state court appearance made by Spain was made under the security arrangements described in Part I. of this Opinion. See above at page 6. Based on Court Exhibits 17 and 18, as well as Judge Broderick's statements prior to sentencing, we must infer that the decision to shackle the defendants throughout the trial was based on the nature of the offenses charged, the acts

of the defendants during pre-trial and trial proceedings, and the security incident reports concerning the behavior of the defendants at San Quentin, compiled in Court Exhibit 17.

The seriousness of the offenses with which Petitioner Spain was charged should not be underestimated. The events leading to the indictment involved a violent escape attempt in which five people died. Those events, however, occurred almost four years before the trial commenced. In the interim, Petitioner Spain made numerous court appearances. Though disruption of pre-trial proceedings by the other defendants did occur, Petitioner Spain's participation in such misconduct appears to have been limited to one altercation resulting in his removal from the courtroom. C.T. 899, 900.

With respect to the trial itself, Court Exhibits 17 and 18 provide this Court with a unique opportunity to view both the scope of the security measures in use and the conduct of the Petitioner and his co-defendants. The security measures, including the physical restraints placed on the defendants, were visible to courtroom participants. See Court Exhibit 18 and C.T. 24005:2-9. The trial occupied 203 court days, not including twenty-four days of jury deliberations, and took place over a seventeen month period. During this period, Petitioner Spain engaged in the fourteen incidents of misconduct listed in Part I. of this Opinion at pages 7-9. Only seven of those fourteen incidents occurred in the courtroom and only three occurred while the jury was present.

It is obviously impossible to discern whether and to what extent

Petitioner Spain's misconduct was prompted by or contributed to by the physical restraints under which he was placed. Throughout the pre-trial and trial proceedings, however, Spain, as well as other defendants, repeatedly requested the opportunity to appear unshackled. In light of the other security measures in use at trial, the failure to provide such an opportunity is of grave concern. See Illinois v. Allen, supra, 397 U.S. at 346.

Because the shackling of criminal defendants is regarded as a last resort, id. at 344, the use of such a procedure is justified only where no less drastic alternative will suffice. Kennedy v. Cardwell, supra, 487 F.2d at 111; United States v. Esquer, 459 F.2d 431, 433 (7th Cir. 1972), cert. denied, 414 U.S. 1006 (1973); United States ex rel. Boothe v. Superintendent, 506 F. Supp.

1337, 1341 (E.D.N.Y.), rev'd on other grounds, 656 F.2d 27 (2d Cir. 1981).

This case involves the uninterrupted use of maximum plysical restraints on a defendant whose disruptive conduct can best be characterized as minor. When viewed in light of the other security precautions in place throughout the trial, the failure to use a less drastic alternative means of restraint might well mandate reversal were this Court required to resolve the shcakling issue.

III. CONCLUSION

Only with the greatest reluctance will this Court or any other federal court intrude upon a state criminal proceeding. See Engle v. Isaac, supra, 102 S. Ct. at 1570-72. However, the protection and vindication of federal constitutional rights requires that considerations of comity give way to the writ that stands as "a bulwark against

convictions that violate 'fundamental fairness.'" Id. at 1570. Petitioner Spain's conviction, obtained in violation of his Sixth Amendment rights to presence and counsel, violates fundamental fairness.

The petition for writ of habeas corpus is granted. California shall commence retrial of the petitioner within ninety (90) days or he shall be released from custody with respect to the conviction at issue. The Court is aware that the Petitioner may face continued incarceration stemming from another conviction.

SO ORDERED.

DATED: June 29, 1982

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT,

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	1 Crim. 16126
vs.	(Sup.Ct. No. 4094
JOHNNY LARRY SPAIN, HUGO A. PINELL and DAVID JOHNSON,	
Defendants and Appellants.	

Appellants Spain, Pinell, and Johnson, three other state prisoners, and an attorney (who remains a fugitive from justice) were charged by a multi-count indictment with offenses arising from a disturbance at San Quentin Prison on August 21, 1971. The disturbance was triggered by prisoner George Jackson who was killed while fleeing from the prison's "Adjustment Center." Also killed were three correctional officers

and two other prisoners.

Lengthy and various pretrial proceedings were followed by a trial by jury which, after three months of jury selection, began with the presentation of evidence in July 1975, and concluded with final arguments in July 1976. The jury deliberated for 24 days before finding appellants guilty as set forth below and acquitting their codefendants.

Appellants Pinell and Spain were sentenced to life imprisonment (Pinell was already serving an indeterminate sentence of a term of years to life and Spain a life term). Appellant Johnson, who had spent more time in custody awaiting trial than the determinate sentence for the crime of which he was convicted, was granted probation.

Spain

Johnny Larry Spain was found guilty of the first degree murders (Pen. Code,

187) of two of the three correctional officers who were killed, and conspiracy to escape by force or violence (Pen. Code, §§ 182, 4530, subd. (a).) There was no substantial evidence that Spain personally committed the murders; instead, the evidence pointed to George Jackson as the killer. Spain's guilt of the murders was based on a theory of vicarious liability: that the murders were the probable consequence of his and Jackson's conspiracy to escape. His acquittals of the murders of the third correctional officer and of the prisoners were consistent with this theory, the evidence indicating that it was someone other than Spain or Jackson who killed the third officer and the prisoners.

Because of the manner in which the

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indictment was framed,[1/] it was necessary (and the trial court so ruled and instructed the jury) for the prosecution to prove that before August 21, there was a conspiracy between Jackson and one Stephen Bingham to effect Jackson's escape and that on August 21, Spain joined that conspiracy. In other words, if there were no conspiracy between Jackson and Bingham, then there was no conspiracy for Spain to join, he was not guilty of conspiracy and, therefore,

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1. "The Grand Jury of the County of Marin . . . accuses Stephen Mitchell Bingham, . . . John L. Spain [et al.], of a felony, to wit: conspiracy . . . in that (a) Stephen Mitchell Bingham and George Lester Jackson, now deceased, did prior to, and continuing on or about August 21, 1971 . . . conspire . . . together and with other persons whose names are unknown to the Grand Jury to . . . commit felonies, to wit: (1) The escape by force or violence . . . of George Lester Jackson and others . . . [etc. (describing other felonies)]. (b) On or about August 21, 1971, . . . defendant . . . John L. Spain . . . did

(Footnote 1 continued on next page).

not legally accountable for the murders.

The evidence that Jackson had planned, and with the assistance of a person or persons outside the prison prepared to escape, was clear. There was evidence that Spain was privy to these plans and assisted these preparations. But as to the central fact necessary to be proven, that Jackson and Bingham conspired, the evidence, while sufficient, is less compelling.

The prison authorities were aware long before August 21, by virtue of a letter in Jackson's hand which had fallen into theirs, that he had encouraged others (not including

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Footnote 1 continues.

join the conspiracy of Stephen Mitchell Bingham and George Lester Jackson and other persons . . . and did . . . conspire . . . with Stephen Mitchell Bingham and George Lester Jackson, and among themselves, for the purpose of . . . commit[ing] the felonies above described . . . ."

Bingham) to smuggle weapons into the prison and to him and otherwise to assist him to escape. After Jackson's death, another letter in his hand was found in the Adjustment Center; some references in the letter suggest it was written in or about early August 1971. The letter reveals that Jackson and "the party" were planning an imminent escape and a variety of violent escapades, that some prisoners had "thrown water" on the plans and, most significantly, that Jackson was already stockpiling weapons and had a gun.[2/]

On August 21, Jackson had two intended visitors, Bingham and a "legal investigator," Vanita Anderson. The latter brought into the prison a small tape recorder. She was frustrated in her

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2. The letter stated: "They know that so it's a question of them facing the pigs guns they think or facing mine. They're trying for a shakedown so that I'll lose mine . . . ."

attempt to see Jackson but, under circumstances which are ambiguous as to whether there was a prearrangement between them,[3/] gave the recorder to Bingham just before his visit. Jackson, his hair, Bingham, Anderson, and her tape recorder were, according to the persons responsible for ensuring that they carried no arms, closely searched before Jackson and Bingham's visit. Nevertheless, Jackson emerged from the visit with a bullet clip in his hair (acutally an "Afro" wig) and an automatic pistol underneath it. The prosecution's theory was that Bingham brought Jackson the gun in the tape recorder.

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3. The officer in charge of the waiting room, who was aware that Anderson had a tape recorder, asked Bingham if he intended to use it "and he said no, and . . . Vanita Anderson . . . asked him if he wanted to use hers, and he indicated that he did."

The security arrangements relative to the interview were such that Jackson could have removed an object from the tape recorder without Bingham's active cooperation, but it is difficult to see how that act could have been performed without Bingham's knowledge. That knowledge would not be sufficient to make Bingham a party to a conspiracy but it would be sufficient to explain his disappearance upon leaving the prison.

When Jackson returned to the Adjustment Center from the interview, the bullet clip was detected; whereupon, he removed the gun from under his wig and forced one of the four correctional officers, who were present to open the cells of other prisoners, many of whom emerged and some of whom -- including, admittedly, Spain and Pinell, and, as shown by sufficient evidence, Johnson -- played an active role in binding the officers and

placing them in cells where they were assaulted. During the turmoil, two other officers were admitted to the Adjustment Center and subjected to similar treatment. An officer accompanying the last to be admitted raised an alarm. Jackson and Spain then fled from the Adjustment Center. Jackson was shot and died instantly. Spain was located in some shrubbery in which he had taken cover. Order was restored in the Adjustment Center. One officer had bled to death from a neck wound; two had been shot to death; three others had their throats cut but survived; two prisoners died from similar wounds. A number of knives and improvised knives were found in various locations. No firearms were discovered except Jackson's pistol.

Spain is a black and was in August 1971 a member of the Black Panther Party. Jackson was also a member of the

party, and it is reasonably probable that "the party" of which he spoke in the letter which referred to his gun and his plan to escape was the Black Panther Party.

The district attorney argued to the jury that the Black Panther Party had helped to smuggle weapons or ammunition to Jackson and implied that Spain's party membership was evidence that he, too, was "involved in" the escape plan and "working with" Jackson.

Pinell

Hugo A. Pinell, nicknamed "Yogi," was found guilty of two counts of assault with a deadly weapon on nonprisoners, namely, correctional officers, Breckenridge and Rubiaco, by a life prisoner. (Pen. Code, § 4500.)

The evidence showed that while Officer Rubiaco was opening cells, Pinell, armed with a small knife, forced

Officer Breckenridge into a tier and ordered three prisoners to take him to a cell. Jackson and Spain forced Officer Rubiaco to join him. Both officers were bound, and for a certain period to time, placed face down on a bunk or made to wear a pillowcase so that their vision was interfered with. Rubiaco's neck was cut twice by an unknown person and a third time by Pinell. The last wound was caused not by a knife but by an object like a razor blade embedded in a toothbrush, which was later found in the cell.

Breckenridge saw Rubiaco's throat being cut but could not tell by whom. At the time or shortly before, he could hear Pinell's voice, and said to him: "There is no need for this, Yogi. Don't do it Yogi." A voice which he recognized as Pinell's replied: "You don't know who this is." Within seconds

of the infliction of the third wound on Rubiaco, Breckenridge was stabbed twice in the neck. Later, he was stabbed a third time by an unidentified assailant.

Johnson

David Johnson was identified by Office Breckenridge as one of the three prisoners who was ordered by Pinell to take him to the cell.

Breckenridge testified that Johnson and a codefendant (who was acquitted) bound him. Some time after Breckenridge was stabbed twice, he heard the codefendant say, "These pigs aren't dead yet," and a voice, which he believed was Pinell's say, "Go in and strangle them." Johnson applied a ligature to his neck for a few seconds but released it when Breckenridge pretended to expire. For this action Johnson was found guilty of assault by means of force likely to produce great bodily injury. (Pen. Code, §

4501.)

Although Breckenridge testified that the third stab wound to his neck (which occurred after Johnson strangled him) caused blood to obscure his vision and a state of shock to ensue, there was medical evidence that it was one of the first two wounds. Experts called by the codefendant testified that the consequences of the wound would include an impairment of Breckenridge's perception and mental functioning (and therefore his ability to recognize Johnson). The reliability of Breckenridge's identification of Johnson was also challenged on the grounds of the officer's limited prior association with the prisoner and a suggestive photographic identification process.

Johnson and the codefendant offered, but were not allowed, to prove by the testimony of an expert in "eye witness

identification," a psychology professor, that the reliability of such identification is adversely affected by such factors as a difference in race between the witness and the person to be identified.

Johnson was not a member of the Black Panther Party.

I. Juror Fagan's Meetings With the Judge

The following facts form the basis of appellant's contention that violation of their constitutional rights at trial by an in camera meeting between the judge and a juror requires reversal of their convictions.

Patricia Fagan had from the age of six or seven been a "good," "close," but not "best" friend of Carolyn Olson. Fagan's and Olson's mothers were "very good" friends. Fagan cared for Olson's daughter on a daily basis while Olson was

attending U.C.L.A. in about 1962. At this time, the two women rarely visited socially. Fagan knew Olson's husband.

In 1968, in Santa Monica, Olson was killed and her husband wounded. At the time, Fagan was living in Concord. She learned of Olson's death a couple of weeks later. The circumstances of the killing, as known to her, were that Olson and her husband were playing tennis when two people damanded their money, ordered them to lie down, and shot them. In 1970, Elmer "Geronimo" Pratt was arrested for the murder and as a member of the "L.A. 18," a group of Black Panther Party members wanted in connection with a shoot-out with the Los Angeles Police. A month or two after Pratt's apprehension, Fagan heard that Olson had been killed by two persons, members of the Black Panther Party, one of them a leader.

Fagan, during the voir dire of the venire, was shown a videotape of the trial judge's admonishing prospective jurors of the importance of revealing any association with crimes of violence and attitudes toward radical groups, specifically the Black Panther Party. Fagan was asked:

"Q. How about crimes violence? Any knowledge of that at all?

"A. No.

"Q. Witness, victim, otherwise?

"A. No.

". . . . . .

"Q. Have you heard of the Black Panther Party?

"A. Yes.

"Q. Do you associate the Black Panther Party with any form of violence in your own mind?

"A. No."

During the course of the trial, Spain called as a witness Louis Tackwood who testified to a supposed plot on the part of various law enforcement officers to encourage an attempt by George Jackson to escape and by a group fo Panthers to rescue him, whereupon all would be ambushed by officers. Tackwood named one Pratt as the leader of the purported rescue group and identified him as a police informant.

On cross-examination, Tackwood was impeached by being asked whether he knew that Pratt had been arrested in 1970 for the murder of a Santa Monica woman, had been convicted of the charged in 1972, and had been in custody continuously during the time when he was supposedly involved in the rescue plot.

During the afternoon recess on the day of the above cross-examination, according to Fagan, she "went to the

chambers of Judge Broderick and told him a friend of mine had been murdered in Santa Monica by a Black Panther Party member, but that I did not know for certain that the two incidents were the same and that if the matter were gone into further, I might start to cry in the courtroom. The judge indicated that it was unlikely that the two incidents were identical and said something to the effect that I should not concern myself with it. I then left his chambers."

The judge's recollection of the incident was "in substantial agreement with Mrs. Fagan's.' He "got the impression that ["if . . . Pratt's killing of her friend was gone into in the evidence of the case"] the emotional drain on her would be very high." He attached "little significane, if any" to her association of Pratt with Olson's murder, and told her so and "that she should simply forget

about it." He asked her if it would affect her disposition toward the case, and she said that it would not.

Fagan returned home in the evening and asked her mother, who "was up here watching the proceedings," but had not attended that day, the name of the person who had killed Olson. Her mother informed her that it was Pratt.

The next day, Fagan went to see the judge again and told him that she had confirmed that Pratt was the killer of her friend. She told him that if the subject should come up again, "it would cause me some concern for my emotional composure in the courtroom," i.e., "if the attorneys were going to go into it much more thoroughly or much more deeply . . . I was liable to start crying . . . ." Her recollection was that "the judge said the lawyers probably were not going to go into that matter further and

I said something to the effect, 'O.K., no problem, then' . . . ." The judge recalled that he told her he didn't see how the connection between Pratt and Olson was "significant" but asked Fagan if she felt that "it would have any affect on her disposition towards the case." According to the judge, "She said that . . . she felt that if Mr. Pratt were called to testify, that she would be very unsettled by that."

The judge did not hold a hearing with regard to Fagan's communications, nor inform the parties or their attorneys thereof. His explanation for not doing so was that he didn't see how Fagan's knowledge of Pratt's crime would have any relation to the evidence in the case. He admitted that the implications of Pratt's knowledge as to her attitude toward violence and her response to questions on voir dire designed to elicit

expressions of that attitude "didn't doawn on me."

No evidence was introduced that Pratt had killed or had been convicted of killing Olson.

Fagan, however, told other jurors that Pratt had been convicted of murdering a friend. She denied making any derogatory comments about the Black Panther Party in that connection.

The cross-examination of Tackwood about Pratt's murder of a Santa Monica woman and Fagan's first visit to the judge occurred on a Thursday; her second visit on a Friday. On Monday a witness identified Pratt as "the leader of the Panther in Los Angeles."

Spain subsequently presented evidence of his Black Panther Party membership and called as witnesses leaders of the Black Panther Party, one of whom testified briefly as to her experience

as a Panther and another as to her association with Spain.

Fagan's relation to Pratt and her visits with the judge came to light after the trial. Appellants moved for a new trial on related grounds in the course of which Fagan testified. In denying the motion, the court found that the questions put to Fagan on voir dire did not call upon her to express her nowledge of the kil.ing of Olson and of the Black Panther Party's association with it and that, even if they did, she did not wilfully conceal such knowledge. With regard to the juror's communications to the judge, the court ruled that "the event lacked any significance" and "had no evidentiary qualifications" and was handled correctly.

The issue on appeal arises at the confluence of three streams of constitutional doctrine, flowing from the right

of defendants in criminal proceedings to trial by an impartial jury, their right to be personally present during the proceedings, and their right to be represented by an attorney.

For our purposes, we assume, as all appellants contend, that there was federal constitutional error committed as a consequence of the in camera conversations between Fagan and the trial judge in that neither appellants nor their counsel were present.[4/]

However, the matter must be put in context and viewed from the perspective

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4. The dissent seems to say that the trial court by not including counsel during the in-chambers discussion with juror Fagan acted contrary to the requirements of Penal Code section 1120. Let us so assume. But because we agreed that there was constitutional error, obviously a matter of greater moment in terms of the magnitude of the error and the nature of the review as to reversibility, we fail to perceive the relevance of discussing the error in terms of Penal Code section 1120.

of the entire case.

The incident arose more than eight months into the trial, some three months after the prosecution had rested and the defense had begun the presentation of evidence.

Tackwood's testimony, in the course of which Pratt's name surfaced, consumed a few days in a case that took a year of actual trial time.

Pratt figures, at most, tangentially in the case. According to Tackwood, the police and "others" plotted to induce Jackson to escape. Pratt, a police informant and a leader of a Southern California Black Panther group, was to mount a rescue operation from the outside to aid Jackson in his escape. The final scene of this plot would see the police lying in wait, massacre Pratt, his rescue group, and Jackson in the course of the attempted escape. Pratt was not present

at the breakout; he was in jail and had been there long before the breakout. Pratt did not appear at the trial. Neither was there any "rescue group" present to aid Jackson in his attempted escape, nor did any member of that alleged group appear at the trial.[5/]

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5. The dissent asserts that juror Fagan's knowledge that Pratt had been convicted of the murder of her friend "filled an 'evidentiary gap' in the prosecution's case." (At p. 11.) Unfortunately, we are not enlightened further as to what the "'evidentiary gap'" was, before it got filled, particularly in view of the fact that the testimony as to Pratt came in as a part of the defense presentation. The dissent thus seems to suggest that unlike our characterization of Pratt as "at most, tangentially," relevant to the case, Pratt and the fact of his conviction were important. But, then, we are confounded by the dissent stating that "If Pratt's status was not relevant to the jury's deliberations, in my view, the potential for prejudice or bliss looms even greater." (At p. 11.) Again, unfortunately, the dessent explicates no further. We return to the dissent's "'evidentiary gap.'"

(Footnote 5 continued on next page).

As we see it, the error was committed by the trial court in denying appellants and their counsel the right to be present at the conversations between Fagan and the trial judge in order to

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Footnote 5 continues.

It is an understatement to say that Tackwood's testimony, on direct examiantion, strained the bounds of credibility, but let us assume that the jury would have believed the testimony but for juror Fagan's knowledge of Pratt's conviction and,d consequently, disbelieved him because of that knowledge. What "'evidentiary gap'" was closed thereby?

Spain's convictions of murder and conspiracy are based on a conspiracy between Jackson and Bingham. There is no conncection between Pratt and Bingham in the record; none is asserted. There is no evidence to suggest that Bingham is an agent provocateur who lured Jackson into the escape attempt. As to the assault convictions, what does the Pratt episode, from an evidentiary standpoint, have to do with the substantive issue of whether Johnson and Pinell committed the assaults of which they were convicted. The short answer is--absolutely nothing. Thus, if there were some "'evidentiary gap' in the prosecution's case," for certain, it was not "filled in" by juror Fagan's knowledge, gained outside the record, of Pratt's conviction.

ascertain whether, as a result of the Pratt murder of Fagan's friend, Fagan would be prejudiced or biased against appellants.[6/]

The bias or prejudice might have arisen because Pratt was allegedly a membr of the Black Panthers and appellant Spain was a Black Panther. Appellants Johnson and Pinell, while not members of the Black Panthers, were blacks. Appellants, of course, were entitled to 12 impartial persons, not 11, in the determination of their guilt

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6. The dissent tells us that if the defendants and their counsel had been present during the Fagan questioning by the trial ocurt, "she would have been disqualified." (At p. 5.) Further, if cross-examination of Fagan had occurred, our brother White states that he "would expect that she [Fagan] would have been excused by stipulation." (At p. 9.) We envy our colleague's ability to predict that which would have happened, but we suggest it is irrelevant. The issue is whether we reverse because of the error that <u>did</u> happen.

vel non. (People v. Pierce (1979) 24 Cal.3d 199, 208.)

The burden, therefore, was upon the People to show, beyond a reasonable doubt, that the error complained of did not contribute to the verdict (Chapman v. California (1967) 386 U.S. 18), in other words, that Fagan was not biased or prejudiced.[7/]

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7. There may well be situations where the failure to accord a defendant the constitutional rights involved here so permeate a trial as to constitute reversible error per se. We do not perceive that to be the case here.

The dissenting opinion cites two cases of this court, People v. Locklar (1978) 84 Cal.App.3d 224 (pp. 12-13) and People v. McNeal (1979) 90 Cal.App.3d 830 (pp. 13-14), implying that we have in this case departed from the views expressed in those cases.

In Locklar, as the dissent points out, for apparently good and sufficient reason, the attorney appearing for the defendant refused to participate in any way in the selection of the jury; nevertheless, the trial judge proceeded to impanel the jury. We held that to be

(Footnote 7 continued on next page).

We believe tht burden has been met. We reason as follows:

Footnote 7 continues.

reversible error per se. We perceive a substantial difference between what occurred in Locklar and what occurred here. Apparently, the dissent does not.

In McNeal, while the jury was deliberating, it came to the attention of the trial court that a juror had personal knowledge as to some aspect of the case which hada "bearing on the way she will vote." (90 Cal.App.3d at p. 835.)

Unlike the case at bar, the trial judge in McNeal advised counsel thereof. The judge discussed the matter with counsel and stated that he would not go into the facts. The juror was brought into chambers and counsel were present. The judge told the juror that "we don't want to go into factual matters" (id., at p. 836) and asked several times whether she could be fair and impartial. Ultimately, she said "yes." The prosecutor suggested that the juror had evidence outside the record. The judge then asked the juror, "'Do you feel you could set that aside and judge the case on the evidence?'" (Id., at p. 836.) The juror answered that she could.

The error in McNeal was not the absence of counsel but the failure to find out what "facts" the juror had knowledge of that were not in the

(Footnote 7 continued on next page).

At the voir dire, Fagan testified that she did not associate the

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Footnote 7 continues.

record. Because of that failure, we did not know, nor could it be known, from the record whether the juror had knowledge of facts aliunde the record of a prejudicial nature. Under these circumstances, we held that it could not be said that the error was harmless beyond a reasonable doubt.

The dissent overlooks the crucial distinction, in this aspect, between McNeal and the case at bench, namely, that in McNeal the record did not disclose, whereas here the record does disclose, the outside information of the juror. The dissent states we paid "'lip service' to Chapman error" (at p. 14) in McNeal because we found "no occasion to examine and weigh the evidence in terms of "'harmless error'" (at p. 14). It would seem anomalous for a justice to characterize his own opinion (White, P.J. concurred in McNeal) as giving "'lip service'" to a legal principle. More important, the dissent fails to understand that since the question in McNeal was juror bias based on knowledge of matters out-side the record, it did not matter what the weight of the inculpatory evidence in the record was and, hence, there was no point in examining it. If it could nto be shown beyond a reasonable doubt that the juror was not so biased, then the judgment had

(Footnote 7 continued on next page).

the Black Panther Party with "any form of violence." During her conversation with the trial judge regarding Pratt, the court asked her if the Pratt killing of her friend would affect her disposition toward the case and she replied

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Footnote 7 continues.

to be reversed. As we pointed out in McNeal and as we have noted above, it could not be shown for we did not know, nor could we know, in McNeal, because of the trial judge's actions, what that knowledge was that precipitated the problem.

People v. Sarazzawski (1945) 27 Cal.2d 7, cited in the dissent (pp. 5-6), supports our position. There, the trial judge in impanelling a jury, told them, in effect, that if they became the jury and during the trial remembered something they had forgotten during their voir dire examination or realized that some of their answers thereon had been erroneous, "'it is your secret. Don't say anything more about it.'" (Id., at p. 18.) The court held that the judge's admonition was reversible error per se, because, by the very nature of the admonition, "any disqualification discovered or remembered by a juror . . . would have to remain foreover undisclosed once the jury were sworn.' (Id., emphasis added.)

that it would not. Finally, at the motion for a new trial where all appellants and their counsel were pre sent, she testified that she associated the Black Panther Party with "worthwhile activities" such as a breakfast program for school children carried on by the party.

It is true, of course, that Fagan's testimony at the motion for a new trial came several months after the verdict. Obviously, it would have been much better if appellants and their counsel had had the opportunity to examine her at the time when the Pratt matter was uppermost in her mind. Nevertheless, we do not see, nor did the trial court see, any reason to disbelieve her testimony.

But we rely not only on Fagan's testimony at the voir dire, her statements to the judge in chambers, and her testimony at the motion for a new trial

(some of that testimony insofar as it relates to her mental attitude in arriving at the verdicts may well have been inadmissible (Evid. Code, § 1150, subd. (a); see People v. Pierce, supra, 24 Cal.3d at pp. 207-208; People v. Hutchinson (1969) 71 Cal.2d 342) and we disregard it.)

In addition, we rely on the objective results of the jury deliberations as demonstrating that the jury, as a whole, and Fagan, in particular, were unbiased.

The jury deliberated 24 days before coming down with its verdicts. Appellants suggest that such an unusual length of time for jury deliberations indicates how closely the case was balanced. On the contrary, it suggests to us that the jury carefully considered and evaluated the evidence, rather than by reason of bias or prejudice, engaged

in a rush to verdict. It must be remembered that there were 6 defendants, 12 counts, and some 45 verdicts to be reached. The prosecution began its opening statement July 28, 1975, and the case went to the jury on July 15, 1976.

Significantly, the jury acquitted three defendants completely, involving a total of 21 charges. Appellant Spain charged with 5 counts of murder, 1 count of conspiracy, and 1 assault count was found guilty of two counts of murder and the conspiracy count, but was acquitted of the other 4 counts. Appellant Pinell was acquitted of all murder and conspiracy charges, and one assault charge, but was convicted of two other counts of assault. Appellant Johnson was acquitted of all murder and conspiracy charges, and one assault charge, but was convicted of another assault charge.

To recapitulate, of 6 defendants

facing 45 verdicts of guilty, 3 defendants were convicted of a total of 6 charges.

We emphasize that Spain, who was a Black Panther, was acquitted of three counts of murder and one count of assault.

In the light of the nature of the error, the marginal relevance of Pratt to the issues of the case, Fagan's disclaimers as to any effect that Pratt's murder of her friend might have on her consideration of the case, and the jury verdicts ultimately reached, we are convinced beyond a reasonable doubt that the jury as a whole, and Fagan, specifically, were not biased or prejudiced.[8/]

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8. The dissent, in the course of its learned disquisition about the fundamentals of due process, quotes from Glasser v. United States (1942) 315 U.S.

(Footnote 8 continued on next page).

II. Shackling of Appellants

Appellants were shackled throughout the trial proceedings. They contend that their convictions should be reversed because the court failed to comply with the requirements of People v. Duran (1976) 16 Cal.3d 282, in not making a "due process determination" that "manifest necessity" existed for the use of shackles, in relying on impermissible considerations in deciding to maintain the shackles, and in not making a record

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Footnote 8 continues.

60, 76 (at p. 15) to the effect that where a defendant has been denied assistance of counsel, courts should not "indulge in nice calculations as to the amount of prejudice arising from its denial." (Emphasis added.)

First, the dissent overlooks the factual matrix from which the Glasser opinion springs. In Glasser, Glasser and a codefendant were to go to trial on a charge of criminal conspiracy. They were represented by separate counsel. Before trial, the codefendant discharged his

(Footnote 8 continued on next page).

as to why appellants were shackled.

Footnote 8 continues.

counsel. The trial court appointed one of Glasser's attorneys to also represent the codefendant, without Glasser consenting to such dual representation, even though the judge was apprised that it was possible that the interests of Glasser and the codefendant were inconsistent. Thereafter, the attorney represented both Glasser and the codefendant throughout the trial. The court reversed Glasser's conviction, stating "Our examination of the record leads to the conclusion that Stewart's (the attorney involved) representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment." (315 U.S. at p. 76.) Thus, what the high court held was that where prejudice was shown on the record, the court would not engage in "nice calculations" as to how much prejudice resulted from the error. Glasser, in fact, suggests that Sixth Amendment error (a part of due process under the Fourteenth Amendment) may, under some circumstances, not be ground for reversal. (Id., at p. 67.)

Finally, in this context, the dissent seems to misread our opinion by implying that we have engaged in those "nice calculations" of which Glasser

(Footnote 8 continued on next page).

The requirement of a "due process of determination" of the necessity for shackles attached as of the decision in People v. Duran, supra, that is, after the trial had been in progress for approximately one year (since the beginning of jury selection) and while six more months remained (until the ver dictswwere returned). But even if we assume that there was error in the shackling of appellants throughout the trial, was the error prejudicial? We believe not. Not only were appellants shackled but the three acquitted defendants were also shackled. Further, the three appellants, as we have noted

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Footnote 8 continues.

speaks. We concluded that appellants were not prejudiced at all by the failure of the trial judge to bring in defense counsel in the course of the juror Fagan incident because, in our view, the record shows, as we have said, that, beyond a reasonable doubt, she was not prejudiced.

earlier, were in fact acquitted of most of the charges against them. Under these circumstances, it is obvious that the shackling had no effect upon the jury's verdicts.

III. Pinell's Opening Statement

Appellant Pinell, who was representing himself, made an opening statement in which he hypothesized that Attorney Bingham had brought a gun into the prison and intimated that he might be able to say certain things which would be prejudicial to his codefendants, giving rise to a conflict of interest with them. Spain and Johnson moved for a mistrial and severance. Their contentions on appeal are (a) that they were entitled to severance under the corollary to Faretta v. California (1975) 422 U.S. 806, that where a codefendant's right to a fair trial is

jeopardized by a defendant's exercise of his right of self-representation, the state's interest in adjoint trial must give way (Thomas v. Superior Court (1976) 54 Cal.App.3d 1054), and they were prejudiced by such denial, and (b) that Pinell's statement posed an Aranda-Bruton problem (People v. Aranda (1965) 63 Cal.2d 518; Bruton v. United States (1968) 391 U.S. 123) which was not solved by Pinell's taking the witness stand.

(a) As shown above, Spain's liability turned on Bingham's conspiring with Jackson; Johnson' did not. It is, therefore, impossible to see how Johnson could have been prejudiced by Pinell's statement about Bingham. The suggestion that Bingham brought a gun into the prison was contrary to Spain's interest. But Pinell did not assert that Bingham had done so; he merely discussed that possibility and said that he would have to prove it. He

did not say that Jackson and Bingham conspired, but rather a contrary proposition, that Jackson was unaware of Bingham's action, which was for the purpose of "setting him up." The slight effect which Pinell's statement might have had was or could have been dispelled on cross-examination, as will be seen.

(b) Pinell's statement was not evidence, and it is questionable whether the Aranda-Bruton rule applies at all. The statement was like any statement of counsel which the jury was instructed was not evidence and not to treat it as such. At the same time, however, a statement made in the presence of the jury, sworn or unsworn, whether by a defendant or an attorney (see People v. Davis (1957) 48 Cal.2d 241), purporting to be based on personal knowledge and tending to inculpate the defendant, would not be

easy for the jury to disregard, and the remedial measures and standards of reversibility prescribed by Aranda and Bruton should be applied.

So far as the Aranda aspect of the rule is concerned, the question is whether a defendant's statement "substantially inculpated or incriminated" a codefendant. (People v. Epps (1973) 34 Cal.App.3d 146, 158.) Because it is not reasonably probable that it did, it was harmless. (See People v. Atkins (195) 53 Cal.App.3d 348, 356-357.)

As to the Bruton aspect of the rule, the statement did not infringe Pinell's codefendants' constitutional rights because he took the stand and was subject to cross-examination. (Nelson v. O'Neill (1971) 402 U.S. 622, 629-630; In re Rosoto (1974) 10 Cal.3d 939, 951-952.)

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IV. Admission of the Jackson Letter

Spain contends that the letter, partially in the hand of George Jackson, which had been in the possession of the authorities for many months before August 1971, and showed his plans to smuggle arms into the prison and to attempt to escape, should have been excluded as hearsay and under Evidence Code section 352. Spain also argues that the letter should have been excluded under the principles of Aranda and Bruton. Respondent counters that the letter fell within the exception to the hearsay rule for declarations against penal interest, that it was probative of Jackson's intent to escape (an element of the conspiracy charge) and not prejudicial as to Spain because it did not inculpate him or his and Jackson's party, and that the Aranda-Bruton rule does not apply to a

statement which does not inplicate anyone other than the person who makes it.

The short answer as to whether the letter was inadmissible hearsay is that it was admissible as an exception to the hearsay rule as showing Jackson's state of mind, i.e., his intent to escape (Evid. Code § 1250, subd. (a)) which was relevant to the conspiracy charge.

The letter did not implicate Spain in Jackson's plans, or show the existence of a conspiracy between Jackson and Bingham, which was prerequisite to Spain's guilt, or implicate the Black Panther Party.

For all these reasons, the admission of the letter did not offend the Aranda-Bruton rule, and its probative value was not outweighed by its prejudicial effect.

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V. Delay of Trial

In September 1973, Spain made a motion, denied in November, to dismiss the indictment on the ground that he had been denied his right to a speedy trial. In January 1974, the indictment was quashed (on a motion in which Spain joined), and the People appealed. In February, Spain made a demand under Penal Code section 1381 to be brought to trial -- i.e., that the People proceed against him by complaint, preliminary examination, and information. The demand was not honored. About a year later, the order quashing the indictment was reversed and the case remanded for trial. Upon remand, he moved to dismiss the indictment on statutory and constitutional grounds. The motion was denied.

Spain contends that the refusal of the prosecution during the time between

the order quashing the indictment and the appellate decision reversing the order to bring him to trial denied him (a) his statutory right under Penal Code section 1381, to be brought to trial within 90 days, and (b) his due process right, not to be subject to unreasonable pretrial delay, and that he was prejudiced by being tried in chains and, in the context of Pinell's unsworn statements, which would not have occurred if he had not been tried together with Pinell, and also by the conditions of pretrial confinement which he endured for an extra year.

Although Spain urges that the reasons for applying Penal Code section 1381 obtained because there was no doubt that the People intended to prosecute him, the code section, by its terms, applies only to "pending" complaints, informations, or indictments and there were no such proceedings pending when

he filed his demand for trial within 90 days. This statutory right, therefore, was not violated, nor was his constitutional right to a speedy trial. As to his other contentions in this regard, we find them to be without merit.

VI. Erroneous Exclusion of Testimony of Expert in Eyewitness Identification

Appellant Johnson contends that the court erroneously failed to conduct an evidentiary hearing on his motion to exclude in-court identification process. It appears, however, that Johnson did not request a hearing except as to a matter which was not in dispute and that the motion was submitted. The court ruled on the basis of assumed facts favorable to Johnson's position.

Weighing the "corrupting effect of the suggestive identification" (Manson v. Brathwaite (1977) 432 U.S. 98, 114) against the factors indicating its

reliability (Neil v. Biggers (1972) 409 U.S. 188, 199-200), and including the factor of the witness' previous familiarity with Johnson (see Manson v. Brathwaite, supra, at p. 133, fn. 14 (dis. opn.)), limited though it may have been, we cannot find that the trial court's implicit determination that the identification was reliable was clearly erroneous. (Neil v. Biggers, supra, at p. 200.)

For the same reasons (see Manson v. Brathwaite, su*ra, at p. 106, fn. 9), we must uphold the admission of evidence of the out-of-court identification process and its results. It appears further that given the admission of the in-court identification, Johnson was not aggrieved by the evidence of the out-of-court identification because its suggestiveness tended to vitiate the in-court identification.

Johnson also complains of a remark by the trial court in the hearing of the jury that the witness had identified him. It appears that the court was merely indicating that the witness had named or pointed out appellant and not some other Johnson and was not expressing an opinion that the identification was accurate. Any such implication was dispelled by a cautionary instruction.

Finally, Johnson urges that it was error to exclude the testimony of an expert in "the vagaries of eyewitness identification." (United States v. Wade (1967) 388 U.S. 218, 228.) The court below relied -- and the People now rely -- on People v. Johnson (1974) 38 Cal.App.3d 1, as authority for exclusion of the evidence.

There, the trial court rejected "an offer of the expert testimony of a

doctor of psychology dealing with the ability of witnesses accurately to perceive, recall and relate and with the distorting effects of excitement and fear on perception and recollection." (Id., at p. 6.) The appellate court sustained the ruling as one well within the range of discretion. (Accord People v. Guzman (1975) 47 Cal.App.3d 380; People v. Brooks (1975) 51 Cal.App.3d 602.) We see no reason to depart from the rule of these caseseand, therefore, we reject appellant's contention.

VII. Instruction Regarding Penal Code Section 4501

Appellant Johnson was convicted of count VIII of the indictment, which charged that he, a person confined in a state prison for a term less than life, assaulted a nonprisoner, Officer Breckenridge, by means of force likely to produce great bodily injury in

violation of Penal Code section 4501.

The indictment was read to the jury, but it was not provided with a copy of the document, even when it requested one. The jury was provided with all the instructions in writing.

Penal Code section 4501 applies also to assault with a deadly weapon. Included in the jury instructions was an instruction which quoted Penal Code section 4501, including both the "by means of force likely to produce great bodily injury" and the "with a deadly weapon" language. Another instruction defined the elements of a violation of section 4501 for the purposes of count VIII as including the use of force likely to produce great bodily injury but not the use of a deadly weapon.

Other instructions defined assault with a deadly weapon for the purpose of other counts.

It is contended by Johnson that some of the jurors may have doubted that he had applied the strip of cloth to Breckenridge's neck long enough for it to constitute an assault by means of force likely to produce great bodily injury but believed that the cloth was used as a deadly weapon and therefore voted to find him guilty of violating section 4501 because that section included assaults with a deadly weapon.

Appellant's contention that he was prejudiced by the misleading nature of the instruction is not compelling.

To reach the conclusion that Johnson was guilty of violating Penal Code section 4501 by assaulting Breckenridge with a deadly weapon, a juror would have to decide that a strip of cloth, which, of course, is not an "inherently deadly" weapon (People v. Russell (1943) 59 Cal.App.2d 660, 665), was used in such a

manner as to be a deadly weapon. The jury was instructed that "A deadly weapon is any object, instrument or weapon which is used in such a manner as to be capable of producing and likely to produce death or great bodily injury." It would be unreasonable for a juror to believe that the strip of cloth was a deadly weapon because "likely to produce great bodily injury" and that Johnson assaulted Breckenridge with such an object but that he did not assault him with force "likely to produce great bodily injury." If appellant did not use force likely to produce great bodily injury, then the cloth was not used in a manner likely to produce great bodily injury and therefore was not a deadly weapon.

VIII. Challenges to Judges

A judge who presided at an early stage of pretrial proceedings was

challenged for cause purpose to Code of Civil Procedure section 170, subdivision 5. It was disallowed. Then at a time when Pinell was arguably unrepresented, the judge determined the question of the number of "sides" to the defense for the purpose of fixing the number of challenges available under Code of Civil Procedure section 170.6, ruling that there was but one for all the defendants. Spain then unilaterally exercised the defendants' one challenge as to this judge. Pinell eventually sought to challenge the trial judge under section 170.6, arguing that the question of sides was erroneously determined that he was not bound by the previous determination, but his challenge was ordered stricken on the ground that the defendants had already exercised the challenge.

Pinell contends that the procedure whereby the earlier judge denied the

challenge for cause was erroneous. The issue might seem moot, since this judge did not preside at trial, but Pinell argues ingeniously that, if proper procedures had been followed, then this judge might have been disqualified (and we cannot assume the contrary), and thus Spain would not have used the defense's one peremptory challenge, and it would have been available to him to employ against the trial judge. The flaw in this argument is that it assumes that the challenge would not have been exercised by some other defendant against another judge who presided after the earlier and before the last. A contrary assumption is reasonable.

The question of sides was subject to redetermination when the matter of Pinell's representation was settled and, in any case' when discovery was granted of the statement of a potential witness

which arguably created an adversity of interests between the defendants as to whether the witness should be treated as friendly or unfriendly.[5/] Assuming it was error to refuse to redetermine that question (cf. Welch v. Superior Court (1974) 41 Cal.App.3d 50, 53), it would not be prejudicial error unless it were reasonably probable that a determination of adversity of interests would have been made. If, as it happens, a determination had been made on the basis of the potential testimony of the witness that an adversity existed, it would have been between Pinell, Spain and codefendant Drumgo, on one side, and other defendants, on the other side or sides. The determination thus would not have resulted in the availability of an

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9. Other, but not substantial, allegations of adversity of interests are made.

additional challenge to Pinell because Spain had already exercised his side's challenge.

The question remains whether it was error to permit Spain unilaterally to exercise the challenge available to all of the defendants (or to all the defendants on his "side"). Put otherwise, the question is whether Pinell had any remedy, such as another challenge, when Spain, without his concurrent, "used up" the only challenge available to him.

Johnson v. Superior Court (1958) 50 Cal.2d 693. 700, considered this problem:

> "It is argued that, while a party who is the sole plaintiff or defendant may always disquality one judge by complying with the statute, a party who is one of several plaintiffs or defendants is placed in a less favorable position. However, this is true only to a limited extent. Initially, a party who is joined with others cannot be in a worse position than a single party, since he has an equal opportunity to disquality the judge

> assigned to hear the case. Such a party cannot possibly be placed at a disadvantage unless one of his coparties has already disqualified a judge in the same action, and then only if his interests are substantially the same as the interests of the one who exercised the challenge. The Legislature could reasonably determine that this limited restriction was justified in order to prevent the undue delays which could otherwise occur, and we hold that section 170.6 does not arbitrarily discriminate against multiple parties.

Thus, Pinell's complaint has been rejected by the Supreme Court.

A contention that the "one challenge per side" limitation of section 170.6 violates equal protection was rejected in Welch v. Superior Court, supra, 41 Cal.App.3d 50, 53, which followed Johnson, adding with reference to Pappa v. Superior Court (1960) 54 Cal.2d 350, that the party left without a challenge can always resort to a challenge for cause.

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IX. Sufficiency of the Evidence Against Pinell

The evidence was very strong that a person who said, "I love you, pigs" to correctional officer Rubiaco, also slashed his throat. Rubiaco's identification of Pinell, by voice, as that person was not unequivocal, uncontradicted, or free of suggestive influences, but its reliability was for the jury to determine, and a reasonable jury, having an opportunity to hear Pinell's voice and note its distinciveness, could have concluded that he was the assailant. (Jackson v. Virginia (1979) 433 U.S. 307, 318-319; People v. Bassett (1968) 69 Cal.2d 122, 138.)

The evidence that Officer Breckenridge, upon observing the cutting of Rubiaco's throat by a person whom he could not see, said, "Don't do it, Yogi," to which a voice which he

recognized as Pinell's, replied, "You don't know who this is," and that within seconds an unseen person or persons stabbed him three times in the throat, is sufficient to support Pinell's conviction of personally assaulting him. But, even if it were not' a reasonable jury might have believed that Pinell ordered other inmates to take Breckenridge to the cell for the purpose of his being assaulted there. Thus, there was sufficient evidence of his guilt as an aider and abettor.

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CONCLUSION

This was a lengthy and difficult trial. In our view, appellants received a fair trial; they were entitled to no less, but they were entitled to no more. There has been no miscarriage of justice.

The judgments as to all appellants are affirmed.

Feinberg, J.

I concur:

Scott, J.

I respectfully dissent.

The majority conclude that appellants received a fair trial. I am compelled to disagree.

Simply stated, a felony criminal trial is a process whereby the enforcement power of government is employed to deprive an individual of the fundamental interest of liberty derived from the common law. (See generally, Tribe, American Constitutional Law (1978) pp. 13-18, 506-514.) And procedural due process requirements are implicated whenever this awesome enforcement power of government is employed.

"'The hirtory of American freedom is, in no small measure, the history of procedure,' and 'in the development of our liberty insistence upon procedural regularity has been a large factor.' Procedural safeguards thus 'protect the citizen in his private right and guard

him against arbitrary action of government.' It does not matter what the merits involve, or what they show; regardless of innocence or guilt, any person is entitled to at least the fundamentals of a fair procedure. Thus, as the New York Court of Appeals phrased it, it has 'refused "to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt."'" (Forkosch, Constitutional Law (1969) p. 449.)

"The element of due process analysis characterized as 'procedural due process' delineates the constitutional limits of judicial, executive, and administrative <u>enforcement</u> of the legislative dictates. This has traditionally involved the elaboration of procedural safeguards designed to accord to the individual 'the right

to be heard before being condemned to suffer grievous loss of any kind' as a result of governmental choices -- which can take the form of acts or, less commonly, of omissions." (See Tribe, American Constitutional Law, supra, p. 502.)

For me, the disturbing reality is that we are herein concerned with the constitutional implications and consequences of an instance of judicial "omissions" to enforce "legislative dictates," i.e., Penal Code section 1022.[1/]

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1. Respondent's brief argues that section 1022 is inapplicable but concedes that Penal Code sections 1089 and 1123 are applicable. I disagree because Pratt's custody status was made a fact in controversy by an otherwise impermissible question unless the prosecution intended to introduce evidence to prove that Pratt was in continuous custody and therefore could not participate in a government instigated plot to free Jackson. I also reject respondent's argument that section 1022 is inapplicable because Fagan had no "personal knowledge" of Pratt's status.

(Footnote 1 continued on next page).

We apparently agree, indeed we must agree, that the immediate consequences to appellants are that they were effectively denied their right to be present and their right to the effective assistance of counsel in exercising their right to confront and examine the juror Fagan during the court's determination that "good cause" did not exist for Fagan's discharge as a juror.

Apparently, to the majority, the

Footnote 1 continues.

In my view a common sense view would include as "personal knowledge" hearsay evidence of a fact from a reliable, trustworthy sources in this instance Fagan's mother. Certainly Fagan was convinced in her mind that Pratt murdered her friend Olson and was convicted and put in prison. In any case, all three code sections require a hearing on the juror's fitness to serve in accordance with minimal standards of due process, which, in my view, require the presence of the appellants and their counsel. Respondents argue that the subsequent motion for new trial satisfies the "hearing" requirement. The argument is absurd.

constitutional implications of the admittedly federal constitutional error is simply to invoke Chapman (Chapman v. California (1967) 386 U.S. 18,* standard of harmless error beyond a reasonable doubt on appellate review.) I cannot agree and therefore dissent. In my view the majority's "three streams of constitutional doctrine" at the point they conflow form the wellspring "due process." And when I put the matter at hand in context and view it, I perceive the law to be that a perspective of the entire case** is impermissible under the presented circumstances.

As the majority recognize in footnote 7, page 15, in Chapman, supra' at page 23, the Supreme Court indicated "that there are some constitutional rights so basic to a fair trial that

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* See majority opinion, page 15.
** See majority opinion, page 13.

their infraction can never be treated as harmless error," and in footnote 8, page 23, listed as cases in point "Payne v. Arkansas, 356 U.S. 560 (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (right to counsel); Tumey v. Ohio, 273 U.S. 510 (impartial judge)." See also Glasser v. United States (1942) 315 U.S. 60, 76, where the Supreme Court held the right to assistance of counsel "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Fourteenth Amendment to the United States Constitution provides inter alia "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." On this record, my conviction is that appellants were denied the procedural safeguards of due process of law

requiring automatic reversal of their convictions and a new trial.

Thus, it is the very "nature of the error"[*] that prompts the observation that in the ultimate analysis appellants present for our consideration the identical question addressed in Turner v. Louisiana (1965) 379 U.S. 466, i.e., the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the "State has purported to accord." (At p. 471.)

Whatever else it is, a modern jury trial is in reality two trials, one in "front" of the jury and one without its presence. Undeniably, both are "critical" stages of the proceedings. The majority reason that "[o]bviously, it would have been much better if appellants and their counsel had had the opportunity

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* See majority opinion, page 18.

to examine [Faganp at the time when the Pratt matter was uppermost in her mind."*/ Not only would it have been "better," it would have been fairer. It was obviously not fair to deprive appellants and their counsel their constitutional and statutory rights to notice juror Fagan's possible disqualification and their right to at least make a reviewable record to show cause why she should have been disqualified. (The probabilities are that she would have been disqualified -- certainly on the second day because she did not "forget" as admonished but discussed one aspect of the case with her mother and in so doing received evidence not developed at trial.)

Analytically, Penal Code section 1120 is a model of procedural due

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* See majority opinion, page 17.

process. Without it, every jury trial in our state would be constitutionally infirm. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (See Irvin v. Dowd (1961) 366 U.S. 717, 722.) "In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b." (Irvin v. Dowd, supra, at p. 722.)

It is basic that the jury's indifference must endure the entire proceedings to satisfy the necessary attributes of a fair trial and due process. Penal Code section 1120 codifies a procedure whereby the indifference of the jury may be reasonably secured. I reassert, without section 1120 our jury trials are rendered constitutionally suspect. People v. Sarazzawski (1945) 27 Cal.2d 7, holds as much. In Sarazzawski, during

voir dire, the trial judge, in effect, instructed the jury that they were to keep as "'secret'" and not to say "'anything more about it'" to the court as to anything they forgot to reveal in their "'honest'" answers to voir dire questions. (At p. 18.) The Supreme Court hled that such an instruction was error requiring automatic reversal of a murder conviction with the imposition of the death penalty because the instruction potentially exacted of the jurors conduct in direct violation of the provisions of Penal Code section 1120. (Sarazzawski, supra, at p. 19.) The opinion concludes and I find it appropriate to the case at bench: "The defendant has not shown that any juror, subsequent to being sworn, discovered that he was subject to disqualification or that he possessed personal knowledge concerning a fact in controversy, but

we are of the view that such a showing is unnecessary. It should not be required because the very substance and nature of the error would normally operate to preclude the possibility of such a showing. Every juror who found that he possessed such disqualification or personal knowledge would be found by the instruction not to reveal it. The defendant thus would be foreclosed from gaining the essential information from what in many cases might be its only repository. Section 4-1/2 of article VI does not contemplate a situation where defendant 'without fault has been denied an opportunity to determine whether or not he has been prejudicially injured.' (Opinion of this court denying hearing in People v. Stevenson, 103 Cal. App. 82, 93 . . . .) We are satisfied that the instruction must be regarded as error prejudicial per se, so fraught with

dangerous potentialities as not to be reconcilable with ourconcept of the necessary attributes of a fair trial and due process, including the rights to be confronted by the witnesses and to have the protection afforded by the provisions of the statute quoted. (Pen. Code § 1120.) [¶] For the reasons above stated the judgment and order appealed from are reversed and the cause is remanded for a new trial." (At p. 19; emphasis added.) (Section 4-1/2 of article VI is not article VI, section 13 of the California Constitution.)

Obviously, all of the "dangerous potentialities" feared by the Sarazzawski court were realized in the case we review. We should not hesitate to automatically reverse these blatant denials of due process.

'Implicitly the majority's view is that the "protection" afforded by the

provisions of Penal Code section 1120 need not be strictly adhered to; perforce, they find what happened here "fair"; I do not. Fairness in our adversary system requires that both the prosecution and the defendant get their full day in court. Frankly, it is not procedural fairness for any party to be advocating his or her case to the triers of the facts on the assumption that they are fair and impartial when, in fact, the trial judge is aware that one of their number's impartiality is at least suspect. A "fair" hearing was required to remove that cloud of suspicion if the constitutional right to an impartial jury was to remain secure for all parties to the lawsuit. Whatever procedure or "process government grants is, by definition, the process that is 'due.'" (See Tribe, American Constitutional Law, supra, p. 505.)

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.'" (Anti-Fascist Committee v. McGrath (1951) 341 U.S. 123, 179 (conc. opn. of Douglas, J.).)

Penal Code section 1022 affords the parties a fair hearing; the procedure followed herein denied appellants a fair hearing on the issue of fagan's impartiality. The trial judge's question of Fagan eliciting a response that Pratt's killing of her friend would not affect her disposition toward the case does not meet the standard of fundamental fairness embodied in the concept of "due process." Commendably, the court was

solicitious of the juror's state of discomfiture (she said she might break down and cry if she saw Pratt face to face); thus he sought to and did reassure her, telling her not to be concerned about the Pratt incident.

But the role and duty of the court is to protect the rights of the accused. Certainly the accused is entitled to the assistance of counsel. (See Glasser v. United States, supra, 315 U.S. 60, 71.) There is no adequate substitute for the presence of the defendants and their counsel at every stage of a trial. As this case clearly illustrates, cross-examination under oath of juror Fagan would most assuredly have probed her state of mind and disposition to depths of which even she was not fully aware. (I would expect that she would have been excused by stipulation.) Essentially, I believe that it is for this

consideration that I perceive the law to be that "[t]he likelihood of prejudice, not its actuality, is inherent where desired counsel is lacking at any critical stage, and this alone requires a reversal of a conviction without a showing of actual prejudice."
(Forkosch, Constitutional Law, supra, pp. 449, 502; see also White v. Maryland (1963) 373 U.S. 59.) Appellants were not entitled to 12 jurors who associated the Black Panthers with breakfast programs, but "due process" required that they afforded full opportunity to seat 12 jurors who did not associate, from either personal experience or that of friends, Black Panthers with acts and crimes of violence. They were effectively denied this opportunity. The trial court's failure to afford this opportunity in a section 1022 hearing violated even minimal standards of due

process. (See In re Oliver (1948) 333 U.S. 257; Tumey v. Ohio (1927) 273 U.S. 510.)

The basic requirement of due process is afforded all regardless of the heinousness of the crimes charged, the apparentness of their guilt or their stations in life. In more eloquent fashion, it was written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. (See Irvin v. Dowd, supra, 366 U.S. 717, 722.)

In Turner v. Louisiana, supra, 379 U.S. 466, 472-473, I find Justice Stewart's thoughts appropriate; they compel the result I reach: "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality -- an appendage --

of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' Sinclair v. United States, 279 U.S. 749, 765. Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' Frank v. Mangum, 237 U.S. 309, 349 (dissenting opinion).

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

What happened in this case operated to subvert these basic guarantees of trial by jury." (Emphasis added.)

Fagan received evidence in this case on an issue of fact that was not developed on the witness stand. The prosecution did not simply ask Tackwood whether he knew Pratt was in custody in laying a foundation to prove that Pratt could not have been enticed by the government to participate in Jackson's escape from San Quentin. The fact that Pratt was in custody for the murder of a Santa Monica woman need never have surfaced if taken care of by appropriate stipulation of the parties. Presumably there would be no occasion to labor on this dissent. But it is clear that the form of the question did strike a responsive chord in at least juror Fagan's mind. Tackwood's answer did not actually impeach his testimony because he answered "no," meaning he did

not know whether Pratt was or was not in custody after trial for the murder of a Santa Monica woman. It appears that the prosecution never proved these facts. However, juror Fagan not only verified the facts by asking her mother, she informed some of her fellow jurors. The record does not reveal when she discussed the matter with her fellow jurors. The immutable fact is that evidence was received by some members of the jury from a source other than the witness stand. It is no answer to conclude that Pratt's involvement was at most tangential because the relevant fact is that Fagan's hearsay evidence filled an "evidentiary gap" in the prosecution's case. If Pratt's status was not relevant to the jury's deliberations, in my view, the potential for prejudice or bias looms even greater.

In Turner v. Louisiana, supra, 379 U.S. 466, the Supreme Court struck down Louisiana's approved practice of allowing two deputy sheriffs' "key" witnesses to also be in charge of the trial jury. The condemned appellant was unable to show any prejudice, but at page 473, the Supreme Court ruled that a showing of prejudice was not required because the "potentialities" outside the trial may have made the courtroom proceedings little more than a "hollow formality." I detect Turner's "potentialities" lurking in this case.

In People v. Locklar (1978) 84 Cal.App.3d 224, 228 (Feinberg, J.), this court recognized the holding in Gideon v. Wainwright (1963) 372 U.S. 355, 352, that "[t]he Sixth Amendment's guarantee of counsel is a fundamental right and is essential to a fair trial." Further we quoted with approval Arger-singer

v. Hamlin (1972) 407 U.S. 25, 37, that "'[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.'" In Locklar, a public defender not assigned or familiar with the defendant's case, who appeared to obtain a short continuance occasioned by the sudden illness of assigned counsel, was required by the trial court to "represent" the defendant during jury selection. Locklar did not consent and counsel, true to his announced intentions, refused to question prospective jurors and exercised no challenges. After trial and conviction we required no showing of prejudice in reversing the judgment. Although we sympathized with the trial court's problem, we reasoned that in denying the defense a

continuance under the circumstances, the trial court's actions denied the defendant the effective assistance of counsel. We held the abuse of discretion error that was reversible per se. We also held that under all the circumstances, including counsel's inaction, the defendant was deprived of a fair jury. Thus, we recognized that because the right to exercise peremptory challenges is an essential part of a trial by jury, a defendant is therefore entitled to the assistance of counsel during jury impanelment. (Id., at p. 229.) There is no apparent reason for not applying the samereasoning and principles to the case at bench wherein the trial court's omission effectively denied appellants effective assistance of counsel. Clearly, the right to show cause that a trial juror is unqualified to perform his or her duties it no less an essential

part of trial by jury than the right to exercise peremptory challenges. Both "rights" function to assure the parties that the case will be decided upon the evidence adduced in court and not otherwise. (See Swain v. Alabama (1965) 380 U.S. 202, 219.)

In People v. McNeal (1979) 90 Cal.App.3d 830 (Scott, J.), we decided an appeal wherein it appeared that after the jury began deliberations the trial court was alerted that one of the jurors possibly had some personal knowledge of the case, brought about by the testimony of a defense witness, which would have a bearing on the way she would vote. The record would not support a finding of jury misconduct. Therefore, we did not base our decision reversing the judgment upon a presumption of prejudice. We evaluated the error in the light of a defendant's right to a jury trial by a

fair and impartial jury as provided by the California Constitution, article I, section 16. At page 840, we concluded: "Itiis evident that a purpose of Penal Code sectiona 1089, 1120, and 1123 is to provide a vehicle for the dismissal of a sworn juror when facts are discovered from which it can reasonably be concluded that the juror, originally thought to be unbiased, actually cannot be fair and impartial. It necessarily follows that in such situations, as in the case at bench, where the fact of a sworn juror's impartiality comes into question as a result of that juror's conduct or statements during the course of the trial or the deliberations, the failure of the court to make at least a preliminary inquiry into the facts of such impartiality cannot be said to be error harmless beyond a reasonable doubt. We conclude, therefore, that the court's

failure to make an appropriate inquiry into the facts in order to determine whether they constituted good cause for discharge of the juror constitutes reversible error." (Emphasis added.)

On Page 837 of our opinion in McNeal, we made it clear that an appropriate inquiry under Penal Code section 1120 consists of examining a sworn juror, and, under sections 1123 and 1089, a hearing, summary in nature and scope, but complete enough to determine good cause. Manifestly in any hearing under either code section due process requires the presence of the parties and the effective assistance of their attorneys.

In McNeal, significantly, although we paid "lip service" to Chapman error, our analysis found no occasion to examine and weigh the evidence in terms of "harmless error."

Finally, in any event, I would not conclude that the prosecution has proved beyond a reasonable doubt that Fagan was not biased or prejudiced for several reasons. First, such a fact essentially is incapable of proof; actually it requires "sheer speculation" (People v. Pierce (1979) 24 Cal.3d 199, 208) which, of course, is not permissible under Chapman. Second, the fact Spain and others were acquitted on several charges certainly indicates the presumption of innocence was not overcome by the entire evidence. But that does not mean that the fact Fagan knew Pratt, a Black Panther leader, murdered her friend played no part in her decision to convict those who were either Black Panthers or who were alleged to be associating criminally with Black Panthers. Perhaps Fagan actually knew whether or not she was influenced by this knowledge, but as I

understand the law, after her verdict, we are not permitted to consider her opinion as to her state of mind. Finally, to paraphrase Glasser, to determine the precise degree of prejudice sustained by appellants by the trial court's "federal constitutional error"*/ is at once difficult and unnecessary. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Glasser v. United States, supra, 315 U.S. 60, 76.)

I would reverse these judgments.

White, P. J.

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* See majority opinion, page 13.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY SPAIN, Appellee, v. RUTH RUSHEN, Director, California Department of Corrections, JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California, Appellants.	)	No. 82-4358 D.C. No. Cv-81-4858 ORDER

Before: GOODWIN and SNEED, Circuit Judges, and JAMESON, District Judge

The panel has voted to deny the petition for rehearing and reject the suggestions for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge requested a vote on whether

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

to rehear the case en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF SERVICE BY MAIL

RUTH RUSHEN, Director, California Department of Corrections; JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California,	)	
Petitioners,	)	No. _____
vs.	)	
JOHNNY SPAIN,	)	
Respondent.	)	

RONALD E. NIVER, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on June 6, 1983, he served true copies of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter on counsel for respondent by placing same in envelopes addressed as follows:

Quin Denvir
State Public Defender
Attn: Dennis P. Riordan, Deputy
1390 Market Street, Suite 425
San Francisco, CA 94102

Benjamin Dreyfus
Charles Garry
1256 Market Street
San Francisco, CA 94102

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

RONALD E. NIVER
Deputy Attorney General